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Attorneys for Frank Jarvis Atwood

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

TUCSON DIVISION

Frank Jarvis Atwood,

Plaintiff,

v.

David Shinn, Director, Arizona Department
of Corrections Rehabilitation & Recovery;
James Kimble, Warden, ASPC-Eyman; Jeff
Van Winkle, Warden, ASPC-Florence;
Lance Hetmer, Assistant Director for Prison
Operations, Arizona Department of
Corrections Rehabilitation & Recovery,

Defendants.

CASE NO. _____

COMPLAINT

This is a capital case.

INTRODUCTION

1. Plaintiff Frank Jarvis Atwood has been a devout practitioner of the Greek Orthodox faith for over two decades. Although he is incarcerated on Arizona's death row, he observes a strict schedule of prayer and study at the direction of his priest, Father Paisios, Abbot of the St. Anthony's Greek Orthodox Monastery in Florence, who baptized him into the faith in July, 2000 and has visited and ministered to him regularly for many years despite, at different points, imposition by the Arizona Department of Corrections, Rehabilitation & Reentry ("ADCRR") of unlawful impediments.

2. Mr. Atwood's faith requires that when the State carries out his execution, Fr. Paisios be permitted to stay by his side and to pray and administer last rites, including placing his hands on him and speaking to him directly. In anticipation of the State seeking an execution date, Mr. Atwood asked ADCRR to accommodate this exercise of religion.

3. ADCRR denied this request, without explaining why it cannot accommodate Mr. Atwood's exercise of his religious beliefs. It will not even permit Fr. Paisios to be in the execution chamber, let alone touch Mr. Atwood or speak or pray aloud.

4. On April 7, 2022, the State filed a Motion for Warrant of Execution, the first such motion it has filed against Mr. Atwood, which is now pending in the Arizona Supreme Court pursuant to an April 5, 2022, scheduling order stating it is poised to rule on that motion in its May 3 conference. If the State's motion is granted, Mr. Atwood's execution would be scheduled 35 days later. Mr. Atwood is thus in danger of being executed in a manner that violates his rights under the U.S. Constitution and federal statute.

5. ADCRR's refusal to accommodate Mr. Atwood's religious beliefs contravenes the Establishment and Free Exercise Clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq.*

1 13. Defendant Lance Hetmer is the Assistant Director for Prison Operations of
2 ADCRR. He is being sued in his official capacity. Arizona’s execution protocol charges him with
3 “the planning and overall direction of all pre-execution, execution and post-execution activities.”

4 **MR. ATWOOD’S FAITH**

5 14. Mr. Atwood is Greek Orthodox. His commitment to this faith is deep and sincere.
6 He converted to Greek Orthodoxy in 2000, obtaining the Baptismal name of Anthony.

7 15. Mr. Atwood has devoutly practiced his faith consistently for the last 22 years,
8 even during the better part of the past decade while he has endured severely debilitating pain and
9 incapacitation as a result, largely, of the deliberate indifference of ADCRR officials and their
10 agents responsible for his medical care in relation to Mr. Atwood’s degenerative spinal condition
11 that has rendered him wheelchair-bound. *Atwood v. Days, et al.*, 2:20-cv-623-JAT-JZB, *Order*
12 *(12/7/2021)* (Doc. 173 at 8) (partially granting injunctive relief in *pro se*-initiated litigation
13 establishing Mr. Atwood’s likelihood of success on the merits in showing ADCRR’s deliberate
14 indifference). Exhibit A.

15 16. Mr. Atwood’s devotion to his faith is so great that he has overcome largely
16 incapacitating pain and disability to devote extraordinary time and effort to studying it,
17 culminating in 2020 in a Doctor of Theology degree earned through a seminary that conducts
18 remote instruction. He has also written several books about his faith, both under his given name
19 and Baptismal name. Those books include *West of Jesus: Bible’s Answer to the Protestant*
20 *Departure from Orthodox Belief* (2007); *Spiritual Alchemy* (2010); and *The Gates of Hades*
21 *Prevaileth Not: Heresies, Schisms, & Other Errancies Renounced by the Eastern Church* (2012).
22 Another book co-written with his wife Rachel Atwood, *And the Two Shall Become One* (2018),
23 describes his spiritual journey, conversion to Greek Orthodoxy, and longstanding relationship
24 with Fr. Paisios.

1 17. Mr. Atwood also introduced his wife Rachel to Greek Orthodoxy, explaining the
2 faith to her, and ultimately, she, too, was baptized into the Church in 2007. Their shared Greek
3 Orthodox faith has become an important part of their marriage.

4 18. Mr. Atwood learned about Greek Orthodoxy when, after writing a letter to a
5 church leader in Cyprus with questions about the religion, he was referred to Fr. Paisios in
6 Florence. Fr. Paisios began visiting Mr. Atwood regularly, and it was Fr. Paisios who baptized
7 him when he eventually converted in July, 2000.

8 19. Fr. Paisios has ministered to Mr. Atwood in person since 2000 via contact visits,
9 where he performs the sacraments. No problem for the prison has ever arisen from these
10 longstanding visits. However, Mr. Atwood has, at times, had to struggle to sustain his access to
11 the sacraments and Fr. Paisios's visitation.

12 20. Mr. Atwood's insistence on physical access to Fr. Paisios and the sacraments is
13 nothing new. He has consistently advocated for his right to practice various aspects of his religion.
14 When, in 2012, after twelve years of regular contact visits to receive sacraments with Fr. Paisios,
15 Mr. Atwood learned the prison intended to significantly curtail this access to religious services,
16 he exhausted the grievance process and filed a lawsuit *pro se* (*Atwood v. Linderman, et al.*, CV-
17 13-00174-PHX-JAT), resulting in an order that he be allowed two-hour religious visits from Fr.
18 Paisios every other week that permitted him to participate in sacraments. When these visits were
19 suspended in the COVID-19 pandemic, Mr. Atwood objected, and through the grievance process,
20 explained to the prison that his religious beliefs still required visits with Fr. Paisios and the ability
21 to participate in sacraments. He has also had to file grievances repeatedly over the denial of access
22 to his religious property.

23 21. Fr. Paisios himself has also advocated for Mr. Atwood's religious needs and has
24 directly contacted prison officials to request specific accommodations for Mr. Atwood. For

1 instance, in 2015, he wrote a letter requesting that the prison allow Mr. Atwood to possess the
2 necessary items for his Holy Communion services and allowing him to wear his religious head
3 covering.

4 22. Mr. Atwood's religious beliefs require that his priest be by his side during his
5 execution to pray and administer last rites, including placing his hands on him and speaking to
6 him directly. Specifically, in Greek Orthodoxy, the ritual known as last rites encompasses four
7 sacraments: Confession, Communion, Holy Unction, and Service of Departure of the Soul. All
8 four require physical presence of the priest. They include reading of prayers, direct
9 communication between Priest and Penitent, and physical contact. The importance of preparation
10 for death in the Orthodox Church is indisputable; St. Anthony's Greek Orthodox Monastery (of
11 which Fr. Paisios is the Abbot), has even published a book on the subject, *The Departure of the*
12 *Soul, According to the Teaching of the Orthodox Church* (2016).

13 23. ADCRR's history of struggle to conduct humane executions heightens the
14 gravity of the violation of Mr. Atwood's right to religious exercise. ADCRR last attempted to
15 execute a prisoner in 2014. ADCRR's lethal injection protocol at the time, which had passed
16 judicial scrutiny, failed, causing a botched killing entailing 15 injections rather than the
17 contemplated single lethal injection and transpiring for nearly two hours. During those two hours,
18 the prisoner, Joseph Wood, was observed to gulp and gasp for air over 600 times. Mauricio Marin,
19 *Witness to 2-hour Arizona execution: Joseph Wood gasped before he died*, The Guardian, July
20 24, 2014.

21 24. ADCRR adopted its current Execution Protocol in the aftermath of that 2014
22 tragedy, and the current competence of ADCRR to conduct a constitutional execution remains in
23 question.

24 25. In this context, Mr. Atwood's need for his religious practices and spiritual

1 guidance during the execution process is heightened, both because this history itself creates
2 significantly heightened anxiety for Mr. Atwood as he goes to his death fully aware of the fates
3 suffered by his predecessors, and because it reveals a real risk that the execution will not succeed
4 in humanely taking his life. Further, because Mr. Atwood has an extremely painful spinal
5 condition, which has left him wheelchair-bound for many years, he is very vulnerable to enduring
6 extreme, even maximum, pain levels throughout the process.

7 26. For the Greek Orthodox, last rites are more important in a death that is difficult
8 than one that passes peacefully. Even if the foregoing risk of an inhumane and/or extremely
9 painful execution were remote, the chance of either outcome make the presence of the spiritual
10 advisor crucial, because it would be in such an eventuality that the need for Fr. Paisios's presence
11 would be greatest. If Fr. Paisios were excluded and that did happen, there would be no repairing
12 the spiritual damage done to Mr. Atwood in the final moments of his life.

13 ARIZONA'S POLICY

14 27. Arizona's execution protocol, known as Department Order 710, originally
15 adopted June 13, 2017, and amended March 10, 2021 (the "Execution Protocol," Exhibit B),
16 provides that the inmate may invite "two clergy and five other persons" to witness his execution.
17 The clergy are not permitted any greater access than the inmate's other witnesses, who are
18 required to remain in the witness room throughout the execution.

19 28. On March 16, 2021, after the State's March 5, 2021, announcement that it had
20 secured a supplier of pentobarbital, the Federal Public Defender's Office in Phoenix, which
21 represents several death-sentenced inmates eligible for execution, wrote to Defendant Shinn
22 inquiring what process inmates should follow to designate a spiritual advisor, including having
23 that spiritual advisor remain with them in the execution chamber. The Department's General
24 Counsel, Brad Keogh, responded the next day, stating:

1 [T]he provisions of DO 710. . . will be observed as with prior executions. As you
 2 acknowledge, the inmate is permitted to designate two clergy to provide spiritual
 3 counsel “leading up to their executions”, and Form 710-2 provides for that designation.
 4 As long as the designated clergy pass a security background check, they will be allowed
 5 to so serve the inmate. If the inmate would like one of his designated clergy to
 personally minister to him during the execution process itself, then that one clergy will
 be allowed to remain *in the witness room, outside the execution chamber, wearing a*
microphone with which to communicate with the inmate. To be clear, no physical
contact with the inmate will be permitted at any time.

6 Exhibit C (emphasis added).

7 29. On June 16, 2021, counsel for Mr. Atwood wrote to General Counsel Keogh on
 8 behalf of Mr. Atwood, requesting information specifically about whether Fr. Paisios would be
 9 permitted contact visits with Mr. Atwood leading up to the execution and have “access within the
 10 given execution chamber or execution room to remain by Mr. Atwood’s side to pray and
 11 administer last rites, including placing his hands on Mr. Atwood, if physically possible, as the
 12 execution is carried out.” Exhibit D.

13 30. Two weeks later, on June 30, 2021, Mr. Keogh responded that “ADCRR
 14 answered these questions from the Federal Public Defender via correspondence dated May 17,
 15 2021,” and attached a copy of that letter. That was the extent of his response to Mr. Atwood’s
 16 questions about accommodation of his religious beliefs. Exhibit E.

17 31. ADCRR’s response to Mr. Atwood’s request (as reflected in its response to other
 18 inmates’ request, made in the abstract) was to refer to the provisions of its Execution Protocol.
 19 The current Execution Protocol does not contain procedures for accommodating a spiritual
 20 advisor inside the execution chamber.

21 32. The existence of consistent, written procedures—an Execution Protocol—has
 22 long been a crucial pillar of Arizona’s position that it can carry out lethal injection in a
 23 constitutional manner. *See, e.g., Dickens v. Brewer*, 631 F.3d 1139, 1149 (9th Cir. 2011) (“[W]e
 24

1 agree with Dickens that it is critical for Arizona to follow the procedures set forth in the Protocol
 2 when conducting an execution.”). ADCRR has struggled to create, let alone comply with, an
 3 Execution Protocol that sufficiently protects inmates’ constitutional rights.

4 33. Executing Mr. Atwood in a manner that does not comport with ADCRR’s
 5 Execution Protocol, or any subsequent written protocol, would create an objectively intolerable
 6 risk of harm due to a lack of procedures contemplating who, as a spiritual advisor, is permitted to
 7 be where and when, and what such an advisor is permitted to do, risking miscommunication,
 8 error, and disruption of the execution process. As the Supreme Court advised in *Ramirez*:

9
 10 If spiritual advisors are to be admitted into the execution chamber, it would also seem
 11 reasonable to require some training on procedures, including any restrictions on their
 12 movements or conduct. When a spiritual advisor would enter and must leave could be
 13 spelled out. If the advisor is to touch the prisoner, the State might also specify where and
 14 for how long. And, as noted, if audible prayer is to occur, a variety of considerations might
 15 be set forth in advance to avoid disruption. It may also be reasonable to document the
 16 advisor’s advance agreement to comply with any restrictions.

17 Slip Op. at 21 (citation omitted). Mr. Atwood is just as entitled to a carefully planned, practiced,
 18 and managed execution as any non-religious inmate or inmate whose religion does not require in-
 19 person last rites, direct speech, and physical contact.

16 EXHAUSTION

17 34. On January 2, 2022, Mr. Atwood submitted an informal complaint through the
 18 prison’s complaint system, stating that his lawyers had been told Fr. Paisios would be allowed in
 19 the witness room only, and his “religious beliefs require Father Paisios to stay by [his] side during
 20 [his] execution and to pray and administer last rites, including placing his hands on [him] and
 21 speaking to [him].” Exhibit F.

22 35. On January 18, 2022, Mr. Atwood received a response that “710 – Execution
 23 Procedures 2.1.3.1.1 inform the inmate that two clergy and five other persons may be invited to
 24

1 be present at the execution. Policy allows for clergy to be present as a witness during execution
 2 but does not give permission to allow clergy to be at your side during execution. Your request to
 3 have clergy at your side during execution cannot be resolved at my level.” Exhibit G.

4 36. On January 19, 2022, Mr. Atwood filed a formal grievance, stating, “As stated in
 5 the Informal Complaint Resolution, my religious needs require that during my execution, and at
 6 the time of my death, that I am able to speak directly with my priest and am able to have him lay
 7 hands on me. ADCRR Dept. Order 710 fails to provide these essential religious necessities and
 8 therefore violates my constitutional (1st Amendment) and congressional (RLUIPA) rights to
 9 freely exercise my religion.” Exhibit H.

10 37. On February 2, 2022, Mr. Atwood received a response to his grievance, stating
 11 that it was “unprocessed.” The response explained, “This is in the ARS codes. Your Inmate
 12 Grievance for this case was unprocessed due to judicial proceedings or decision of the courts.
 13 You cannot submit a grievance appeal.” Exhibit I.

14 38. In an abundance of caution, Mr. Atwood submitted an appeal anyway on
 15 February 6, 2022. He has received no response. Exhibit J.

16 39. Mr. Atwood has complied with all procedural rules and fully exhausted the
 17 administrative remedies that are available to him, satisfying the exhaustion requirement of the
 18 Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a).

19 CLAIMS FOR RELIEF

20 **No. 1: ADCRR’S EXECUTION PROTOCOL IS NOT NEUTRAL TOWARD**
 21 **RELIGION AND EVINCES A HOSTILITY TOWARD RELIGION**
 22 **GENERALLY, VIOLATING THE FIRST AMENDMENT’S ESTABLISHMENT**
 23 **CLAUSE.**

24 40. Mr. Atwood hereby realleges and incorporates by reference the preceding

1 paragraphs in this Complaint.

2 41. The First Amendment of the United States Constitution commands that “Congress
3 shall make no law respecting an establishment of religion.” U.S. Const., amend. I. This command
4 is similarly binding on the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The
5 Establishment Clause of the First Amendment prohibits governmental entities from passing laws
6 that demonstrate a hostility toward religion or that prefer one or more religions over others.
7 *Larson v. Valente*, 456 U.S. 228, 246 (1982); *Zorach v. Clauson*, 343 U.S. 306, 313-15 (1952).

8 42. The Establishment Clause requires the State to be neutral *among* religions and
9 *between* religion and non-religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 698 (1984); *Lemon*
10 *v. Kurtzman*, 403 U.S. 602, 612 (1970); *see also Comm. for Public Ed. & Religious Liberty v.*
11 *Nyquist*, 413 U.S. 756, 788 (1973) (noting that, to maintain an attitude of neutrality toward
12 religion, government cannot “advance[]” or “inhibit[]” religion). Defendants’ policy, expressly
13 distilled into its current Execution Protocol (*supra* ¶ 26*), excluding all spiritual advisors from
14 the execution chamber is not neutral. Inmates who adhere to no religion are neither harmed nor
15 targeted by ADCRR’s policy; inmates who do—whatever that religion may be—are.

16 43. A law or policy that is not neutral between religion and non-religion, like
17 ADCRR’s Execution Protocol, is inherently suspect, and strict scrutiny must be applied. *Larson*,
18 456 U.S. at 246. The policy can survive this level of scrutiny only if it is narrowly tailored to a
19 compelling government interest. *Id.* at 247.

20 44. ADCRR has never explained what compelling interest its discriminatory policy
21 could possibly serve. Indeed, it plainly serves none. This absence of a compelling government
22 interest is especially true where, as here, the spiritual advisor is well known to ADCRR and has
23 a decades-long history of uneventful service inside the prison.

24 45. Even if the blanket policy excluding spiritual advisors in ADCRR’s Execution

1 Protocol did serve a compelling state interest, it is not narrowly tailored to that interest.

2 **No. 2: ADCRR’S POLICY UNJUSTIFIABLY INTERFERES WITH MR. ATWOOD’S**
 3 **ABILITY TO PRACTICE HIS RELIGION, VIOLATING HIS FIRST**
 4 **AMENDMENT RIGHT TO THE FREE EXERCISE OF RELIGION.**

4 46. Mr. Atwood hereby realleges and incorporates by reference the preceding
 5 paragraphs in this Complaint.

6 47. The First Amendment also commands that “Congress shall make no law ...
 7 prohibiting the free exercise of” religion. U.S. Const., amend. I. Like the Establishment Clause,
 8 the Free Exercise Clause’s command is binding on the states. *See Cantwell*, 310 U.S. at 303.

9 48. Proceeding under ADCRR’s current Execution Protocol will prohibit Mr.
 10 Atwood’s ability freely to exercise his religion. Specifically, it will prevent him from receiving
 11 his last rites and final prayers at the time of his death as his religious beliefs require.

12 49. The level of scrutiny to be applied when reviewing policies that hinder an
 13 individual’s ability freely to exercise his religion depends on whether the law is neutral and
 14 generally applicable. As Justice Kennedy explained in *Church of the Lukumi Babalu Aye, Inc. v.*
 15 *Hialeah*, 508 U.S. 520 (1993), “a law that is neutral and of general applicability need not be
 16 justified by a compelling government interest even if the law has the incidental effect of burdening
 17 a particular religious practice.” *Id.* at 531.¹ These laws need only be rationally related to a
 18 legitimate government interest. *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128,
 19 1140 (9th Cir. 2021). A law that does not satisfy both of these requirements “must be justified by
 20 a compelling governmental interest and must be narrowly tailored to advance that interest.” *Id.*;
 21 *see also Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1734 (2018)

22
 23 ¹ Congress has explicitly provided protection from such laws by subjecting them to strict scrutiny
 24 as a matter of statute in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §
 2000bb *et seq.* and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),
 42 U.S.C. § 2000cc *et seq.*

1 (Gorsuch, J., concurring).

2 50. ADCRR's current Execution Protocol is not neutral because it evinces a hostility
3 toward religion and thereby favors non-religious inmates over religious inmates. Accordingly, the
4 policy is permissible only if it can survive strict scrutiny.

5 51. The blanket policy of excluding spiritual advisors in ADCRR's current Execution
6 Protocol cannot survive strict scrutiny because it fails to serve any compelling government
7 interest. This is especially true where, as here, the spiritual advisor is well known to ADCRR and
8 has a decades-long history of uneventful service inside the prison.

9 52. Even if the current Execution Protocol's blanket policy excluding spiritual
10 advisors did serve a compelling government interest, it is not narrowly tailored to that interest.

11 53. The current Execution Protocol's blanket policy excluding spiritual advisors
12 cannot even survive the rational basis review applicable to neutral laws, because where the
13 spiritual advisor is known to ADCRR and has a long history of uneventful service inside the
14 prison, the blanket policy of exclusion is not rationally related to any legitimate government
15 interest.

16 **NO. 3: THE BLANKET POLICY EXCLUDING SPIRITUAL ADVISORS IN ADCRR'S**
17 **CURRENT EXECUTION PROTOCOL PLACES A SUBSTANTIAL BURDEN**
18 **ON MR. ATWOOD'S EXERCISE OF A SINCERELY HELD RELIGIOUS**
A COMPELLING GOVERNMENT INTEREST, THUS VIOLATING RLUIPA.

19 54. Mr. Atwood hereby realleges and incorporates by reference the preceding
20 paragraphs in this Complaint.

21 55. Congress enacted RLUIPA "to accord religious exercise heightened protection
22 from government-imposed burdens, consistent with" Supreme Court precedents. *Cutter v.*
23 *Wilkinson*, 544 U.S. 709, 714 (2005). Under the statute, ADCRR must not impose a substantial
24 burden on Mr. Atwood's religious exercise unless the restriction "(A) is in furtherance of a

1 compelling governmental interest; and (B) is the least restrictive means of furthering that
2 compelling governmental interest.” 42 U.S.C.A. § 2000cc (a)(1). When the state puts “substantial
3 pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion
4 exists.” *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 718 (1981). Once Mr.
5 Atwood shows that his religious exercise was burdened, ADCRR “must prove its actions were
6 the least restrictive means of furthering a compelling governmental interest.” *Walker v. Beard*,
7 789 F.3d 1125, 1134 (9th Cir. 2015). A governmental action is the least restrictive alternative
8 when there is “an ‘exact fit’ between the potential harm and the challenged state action.” *Id.* at
9 1137.

10 56. Mr. Atwood has a sincere, longstanding and deeply held faith in Christianity, and
11 specifically Greek Orthodoxy. Fr. Paisios has been his priest and spiritual advisor for over two
12 decades, physically ministering to him throughout those many years.

13 57. Mr. Atwood’s faith requires him to receive Greek Orthodoxy’s last rites at the
14 time of his death. In his ancient faith, this requires the physical presence of his priest who can
15 touch him while praying and speaking to him. While RLUIPA protects “any exercise of religion,
16 whether or not compelled by, or central to, a system of religious belief,” §2000cc-5(7)(A), this
17 longstanding traditional exercise of religion, practiced in the crucial moment when the faithful
18 are about to meet their death, is both. *Cf. Ramirez*, Slip Op. at 12-14.

19 58. Proceeding under ADCRR’s current Execution Protocol that denies Mr. Atwood
20 the ability to have Fr. Paisios with him in the execution chamber to administer the last rites, put
21 his hands on Mr. Atwood, and pray and speak to him aloud, coming as it would in the crucial last
22 moments of Mr. Atwood’s life on earth, would place a substantial burden on the exercise of his
23 sincerely held religious beliefs.

24 59. Proceeding under ADCRR’s current Execution Protocol that denies Mr. Atwood

1 the ability to have Fr. Paisios present with him in the execution chamber to administer the last
 2 rites, put his hands on Mr. Atwood, and pray and speak to him aloud, does not meaningfully
 3 advance any government interest, let alone a compelling one.

4 60. To the extent applying this burden to Mr. Atwood does advance some compelling
 5 government interest, using a protocol with a blanket policy excluding spiritual advisors from the
 6 execution chamber is not the least restrictive means of doing so.

7 PRAYER FOR RELIEF

8 WHEREFORE, Plaintiff Frank Jarvis Atwood prays that the Court provide relief as
 9 follows:

- 10 1. A declaratory judgment or other order that the defendants' conduct, through
 11 ADCRR's policy, is in violation of Mr. Atwood's rights under the First
 Amendment's Establishment and/or Free Exercise Clauses;
- 12 2. A declaratory judgment or other order that defendants' conduct, through
 13 ADCRR's policy, is in violation of Mr. Atwood's rights under RLUIPA;
- 14 3. An injunction ordering defendants and ADCRR to accommodate fully Mr.
 15 Atwood's religious exercise by permitting his spiritual advisor to be physically
 proximate at the time of his execution and able to place hands upon Mr. Atwood
 16 and speak directly to him in the administering of last rites under the Greek
 Orthodox faith;
- 17 4. An injunction or other order enjoining defendants and ADCRR and any and all
 18 other agents or employees of ADCRR from executing Mr. Atwood without a valid
 Execution Protocol that accommodates his exercise of religion;
- 19 5. Should the Arizona Supreme Court grant the State's motion for an execution
 20 warrant against Mr. Atwood, pursuant to the pending such motion or a future such
 motion during the pendency of these federal proceedings, an order:
 - 21 (a) requiring ADCRR to establish expressly by lawful amendment to its
 Execution Protocol the specific means by which ADCRR shall accommodate
 22 Mr. Atwood's religious exercise in relation to the physical presence and
 permitted conduct of his spiritual advisor within ADCRR's execution
 23 chamber; and
 - 24 (b) staying any such execution warrant or otherwise enjoining ADCRR from
 executing Mr. Atwood under any future execution warrant until (i) ADCRR

1 establishes by expressly amending its Execution Protocol, in accordance with
2 the U.S. Constitution, RLUIPA, and federal law, to permit Mr. Atwood to
3 physically access his spiritual advisor within ADCRR's execution chamber
4 consistent with his religious practices and beliefs, and (ii) this Court, following
a hearing and fact finding, confirms in a declaratory judgment that ADCRR's
Execution Protocol as amended complies with this enumerated item of Mr.
Atwood's prayer for relief (*viz.*, 5.(b)(1)); and

5 6. Other such relief as this Court deems proper and just.

7 DATED this 13th day of April, 2022.

8 /s/ Joseph J. Perkovich

9 JOSEPH J. PERKOVICH

10 AMY P. KNIGHT

11 Attorneys for Frank Jarvis Atwood
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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the District of Arizona.

The completed cover sheet must be printed directly to PDF and filed as an attachment to the Complaint or Notice of Removal.

Plaintiff(s): Frank Jarvis Atwood

**Defendant(s): David Shinn , ADCRR Director;
James Kimble , Warden, ASPC-Eyman; Jeff Van Winkle , Warden, ASPC - Florence; Lance Hetmer , ADCRR Assistant Director for Prison Operations**

County of Residence: Pinal

County of Residence: Maricopa

County Where Claim For Relief Arose: Pima

Plaintiff's Atty(s):

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Defendant's Atty(s):

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1601 West Jefferson St
Phoenix, Arizona 542-5497
602-542-5497**

II. Basis of Jurisdiction:

3. Federal Question (U.S. not a party)

III. Citizenship of Principal
Parties (Diversity Cases Only)

Plaintiff:- N/A

Defendant:- N/A

IV. Origin : **1. Original Proceeding**

V. Nature of Suit: **550 Civil Rights**

VI. Cause of Action: **42 U.S.C. § 1983 (First Amendment Establishment and Free Exercise clause violations in execution procedures); 42 U.S.C. § 2000cc (Religious Land Use and Institutionalized Persons Act violation in execution procedures)**

VII. Requested in Complaint

Class Action: **No**

Dollar Demand: **Injunctive & Declaratory relief only**

Jury Demand: **No**

VIII. This case IS RELATED to Case Number **4:98-cv-00116-JAS** assigned to Judge **Soto.**

Signature: Amy P. Knight

Date: 4/13/2022

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Frank Jarvis Atwood,
Plaintiff,

v.

Panann Days, et al.,
Defendants.

No. CV 20-00623-PHX-JAT (JZB)

ORDER

Plaintiff Frank Jarvis Atwood, who is currently confined by the Arizona Department of Corrections (ADC) in the Arizona State Prison Complex (ASPC)-Eyman, filed this civil rights action pursuant to 42 U.S.C. § 1983.¹ Before the Court is Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction regarding his medical care. (Doc. 109.) The Court held a hearing on the Motion on October 29, 2021 and permitted the Parties to file amended proposed findings of fact and conclusions of law.² The Court's findings of fact and conclusions of law based on the Parties' briefing and the hearing are set forth herein.

....

¹ Plaintiff filed the original Complaint pro se but is now represented by counsel.

² Plaintiff and Defendants Centurion and Olmstead ("Centurion Defendants") had filed proposed Findings of Fact and Conclusions of Law prior to the hearing. (Docs. 147, 151.) After the hearing, only Plaintiff filed amended proposed Findings of Fact and Conclusions of Law as well as a proposed order (Doc. 166); Centurion Defendants filed an Objection to Plaintiff's Proposed Order (Doc. 171). Defendants Days, Shinn, Scott, Lopez, and Arnold ("ADC Defendants") did not file any proposed Findings of Fact and Conclusions of Law either before or after the hearing.

I. Findings of Fact

Plaintiff has been incarcerated by ADC since 1987. (Doc. 147 ¶ 1.) Philip A. Davidson, MD, a board-certified orthopedic surgeon, has evaluated Plaintiff telephonically, reviewed Plaintiff's medical records related to his current condition, and testified at the hearing. Based on his review of Plaintiff's January 8, 2021 MRI of the lumber and cervical spine, Dr. Davidson concluded that Plaintiff has "severe cervical spondylosis with severe radicular symptoms to include, of great importance, C5-C6 myelomalacia. He has apparently overt radicular symptomatology as well as radiating pain, weakness, and motor dysfunction." (Doc. 109 at 28-29 ¶ 37.) Plaintiff's lumbar spine is his most painful condition, and "[his] neural symptomatology has contributed to the weakness that is limiting his ability to transfer and position, let alone ambulate. In addition, the neural compression and degenerative spondylosis are highly painful, most acutely when prone or in an erect seated posture." (*Id.* at 29 ¶ 38.)

Plaintiff's back pain began around 1990, and he has been treated over the past 30 years with oral medications. (*Id.* at 21 ¶ 14.) Plaintiff began using a wheelchair in 2015 and at that time he was classified an ADA (Americans with Disabilities Act) patient. (Doc. 167 (Hearing Tr.) at 117.) From 2011 to September 2020, Plaintiff was prescribed Tramadol, which effectively treated his pain. (Doc. 109 at 23 ¶ 20.) Plaintiff has tried numerous other medications, such as Cymbalta, for his pain, but they have either failed or Plaintiff had negative reactions to them. (Doc. 167 at 61, 121.)

In September 2020, Defendant Nurse Practitioner Olmstead discontinued Plaintiff's Tramadol prescription, and from October 2020 to the present, Plaintiff has been prescribed a lidocaine patch and Tylenol, which have provided "no appreciable pain relief." (Doc. 109 at 23 ¶ 20.) Olmstead asserts that "the medical decision has been made, after repeat examinations and other testing, that [Plaintiff] needs to be weaned off of narcotics, including Tramadol, due to poor tolerance/side effects and that had or have been, at times, a part of his prescription medication regimen, and that there is no medical indication to continue this medication." (Doc. 114-6 at 2 ¶ 4.) According to Olmstead, "[n]arcotics are

1 very powerful medications that should only be used in the appropriate case and for the
 2 shortest duration needed, which is how they have been used.” (*Id.*) Olmstead testified that
 3 Centurion’s medical director told her it was Centurion’s policy “that long-term opioids are
 4 not prescribed unless a patient has cancer pain or they are in a hospice setting.” (Doc. 167
 5 at 169.) During the hearing, the Court asked Defendants to produce the policy. (*Id.* at 208-
 6 209.) Following the hearing, Defendants notified the Court that “no formal written policy
 7 exists,” and they submitted the declaration of Dr. Rodney Stewart, Centurion’s Site
 8 Medical Director for ASPC-Eyman. (Doc. 165 at 1.) Dr. Stewart states that he has
 9 implemented a policy “that patients are not to be prescribed opioids, such as tramadol, for
 10 an extended or indefinite period of time unless that patient is suffering from cancer-related
 11 illness or pain, terminal illness with pain, and other serious long-term disease implicating
 12 severe pain symptoms.” (Doc. 165-1 at 1 ¶ 5.)

13 Plaintiff has not walked since 2017 and without Tramadol suffers
 14 “incomprehensible pain every time he need[s] to transfer to bed, chair or wheelchair.”
 15 (Doc. 109 at 22-23 ¶¶ 17, 19.) Plaintiff can only sleep sporadically because he cannot lie
 16 flat and must sit in his wheelchair or partially recline in bed to minimize the severity of
 17 constant pain. (*Id.* at 24 ¶ 23.) Plaintiff’s pain interferes with nearly all activities of daily
 18 living. (Doc. 167 at 27-28.) Without Tramadol, Plaintiff’s pain is severe at 9 or 10 out of
 19 10, his ability to transfer to and from his wheelchair is decreased, and his sleep is even
 20 more compromised. (Doc. 109 at 27 ¶ 34.) With Tramadol, Plaintiff’s pain decreases to a
 21 5 or 6, a moderate and manageable pain level. (Doc. 167 at 112, 121.)

22 Plaintiff has a recent history of falling, secondary to weakness in his legs, including
 23 falls in November 2020 and March 2021 when he was not taking Tramadol. (Doc. 109 at
 24 24 ¶ 22.) Plaintiff testified he has fallen a half dozen times since 2016, and he attributes
 25 his falls to his medical condition and not Tramadol because the falls occur when he tries to
 26 move, and he feels a twinge of pain and weakness and collapses. (Doc. 167 at 115.) Dr.
 27 Davidson testified that Plaintiff’s falls are not necessarily attributable to Tramadol, and the
 28

1 falls indicate to him that Plaintiff needs more assistance with transfers and needs to be in a
2 safer environment. (*Id.* at 49.)

3 In January 2021, Plaintiff suffered an extreme case of diarrhea, which was
4 eventually diagnosed as a staph infection; the infection intensified Plaintiff's back pain and
5 caused spasms, and he was unable to leave his bed or roll onto his side for nearly a week.
6 (Doc. 109 at 25 ¶¶ 25-26.) To accept meals and medication, Plaintiff crawled or slid across
7 his cell's urine-covered and feces-smear floor. (*Id.* ¶ 25.) Plaintiff received injections
8 of Toradol and a corticosteroid injection, which provided some pain relief for a couple of
9 weeks. (Doc. 109 at 21 ¶ 15.)

10 Plaintiff received Tramadol when he was hospitalized in April 2021 and afterwards
11 in the infirmary, but when he was moved back to the Browning Unit in June 2021, NP
12 Olmstead reduced the dose of Tramadol to once daily with the intention of weaning
13 Plaintiff off Tramadol completely. (Doc. 109 at 26 ¶¶ 28-33.)

14 On April 6, 2021, Olmstead submitted an urgent request for a neurosurgery
15 consultation; Olmstead noted that she reviewed the case with Dr. Young, who asked that a
16 consult be entered with a neurosurgeon to see if Plaintiff was a candidate for epidural
17 injections. (Doc. 114-1 at 5-6.) On June 25, 2021, Plaintiff had an appointment with
18 neurosurgeon Dr. Feiz-Erfan at Valleywise Health, but Dr. Feiz-Erfan first wanted an
19 updated MRI and a follow-up appointment in 4 to 6 weeks. (Doc. 114-6 at 2 ¶ 7; Doc.
20 114-4 at 36-39.) On June 30, 2021, Olmstead submitted a routine consultation request for
21 an MRI of the cervical spine and for a follow-up appointment with the neurosurgeon once
22 the MRI is completed. (Doc. 114-16 at 2 ¶ 7; Doc. 114-5 at 11.) The MRI was authorized,
23 and Plaintiff had the cervical MRI on July 16, 2021. (Doc. 114-5 at 11.; Doc. 130-1 at 2.)

24 Plaintiff next saw Dr. Feiz-Erfan on July 30, 2021, and Dr. Feiz-Erfan noted that
25 Plaintiff's chief complaint was neck and back pain, but Plaintiff was also febrile and short
26 of breath. (Doc. 132-1 at 15, 17.) Dr. Feiz-Erfan diagnosed Plaintiff with "status post
27 anterior fusion, cervical 5-6, for myelopathy done by me on 12/11/2018. New Diagnosis
28 is canal stenosis, lumbar 1-2; adjacent level disease, cervical spine." (*Id.*) Dr. Feiz-Erfan's

1 Plan of Care was “Epidural injection, lumbar 1-2. Physical therapy,” follow up in 3
 2 months, and to go to the nearest emergency room for acute symptoms, noting that Plaintiff
 3 “looks ashen and pale and appears sick acutely.” (*Id.*) Under “Patient Instructions,” the
 4 doctor wrote, “Patient to have injections and PT and follow up in 6 weeks.”³ (*Id.* at 19.)
 5 Olmstead noted in an August 2, 2021 medical record that Plaintiff was admitted to
 6 Valleywise Hospital on July 30 for urosepsis and had surgery for a new left stent placement
 7 and cystoscopy. (*Id.* at 37.) Dr. Davidson testified that in Plaintiff’s case, spinal injections
 8 would provide only temporary or transient relief, and injections could diminish the need
 9 for Tramadol if repeated two to three times a year, but that it is likely they would only
 10 provide partial relief and Plaintiff may still need Tramadol in addition.⁴ (Doc. 167 at 57.)

11 On August 2, 2021, Olmstead submitted a routine consultation request for epidural
 12 lumbar injections. (Doc. 132-1 at 37.) As of the date of the hearing, October 29, 2021,
 13 Plaintiff had not received his first epidural injection, but defense counsel asserted Plaintiff
 14 would have an injection in the next two weeks. (Doc. 167 at 199.) After seeing Dr. Feiz-
 15 Erfan, Plaintiff had four half-hour physical therapy sessions at the prison, but he testified
 16 that the physical therapy ended up causing more discomfort than any benefit. (*Id.* at 119.)

17 In October 2021, Plaintiff was again in the infirmary and while there, a doctor
 18 prescribed Tramadol for his pain on October 20, 2021, but Plaintiff did not receive
 19 Tramadol until the night before the October 29, 2021 hearing. (*Id.* at 109.) Plaintiff
 20 testified that a nurse told him he received Tramadol just before the hearing because “they
 21 wanted to be able to say [Plaintiff] was on the medication again.” (*Id.* at 109-110.)

22 Dr. Davidson recommends without reservation that Plaintiff again be prescribed
 23 Tramadol given that trials of other medications have not worked and because other
 24 narcotics that might help his pain could be more addictive and habit forming. (*Id.* at 60-
 25 61.) Dr. Davidson stated a typical dose is 50 mg twice a daily, but the dose would have to

26
 27 ³ It is not clear from the record if Dr. Feiz-Erfan was planning one epidural injection
 28 or a series of injections because he used the singular “injection” in the “Plan of Care” and
 plural “injections” in the “Patient Instructions.”

⁴ Dr. Feiz-Erfan did not testify.

1 be adjusted based on what Plaintiff has taken in the past and on the effectiveness of the
 2 spinal injections. (*Id.* at 58.) Dr. Davidson’s professional opinion is that “it is imperative
 3 and humane that additional, palliative measures also be implemented on this patient’s
 4 behalf immediately. These include lumbar and cervical orthosis, along with a residency
 5 setting where immediate hands-on wheelchair transferring assistance is continually
 6 available.” (Doc. 109 at 30 ¶ 44.) Defendants’ expert, Dr. Thomas Fowlkes, is board-
 7 certified in emergency medicine and is currently the medical director at a county detention
 8 facility in Oxford, Mississippi. (Doc. 167 at 64.) Dr. Fowlkes reviewed Plaintiff’s medical
 9 records and agreed there was no evidence Plaintiff was addicted to Tramadol, that Plaintiff
 10 was diverting or abusing Tramadol, or that his cognition suffered because of Tramadol.
 11 (Doc. 167 at 80-85.)

12 **II. Preliminary Injunction Standard**

13 “A preliminary injunction is ‘an extraordinary and drastic remedy, one that should
 14 not be granted unless the movant, by a clear showing, carries the burden of persuasion.’”
 15 *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520
 16 U.S. 968, 972 (1997) (per curiam)); *see also Winter v. Natural Res. Def. Council, Inc.*, 555
 17 U.S. 7, 24 (2008) (citation omitted) (“[a] preliminary injunction is an extraordinary remedy
 18 never awarded as of right”). “A plaintiff seeking a preliminary injunction must show that
 19 (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm without
 20 an injunction, (3) the balance of equities tips in his favor, and (4) an injunction is in the
 21 public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).
 22 The movant “has the burden of proof on each element of the test.” *See Envtl. Council of*
 23 *Sacramento v. Slater*, 184 F. Supp. 2d 1016, 1027 (E.D. Cal. 2000).

24 Where a movant seeks a mandatory injunction, rather than a prohibitory injunction,
 25 injunctive relief is “subject to a higher standard” and is “permissible when ‘extreme or very
 26 serious damage will result’ that is not ‘capable of compensation in damages,’ and the merits
 27 of the case are not ‘doubtful.’” *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017)
 28 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879

(9th Cir. 2009)). “A mandatory injunction orders a responsible party to take action,” while “a prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits.” *Marlyn Nutraceuticals*, 571 F.3d at 879 (internal quotation marks omitted). “The ‘status quo’ refers to the legally relevant relationship between the parties before the controversy arose.” *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1060-61 (9th Cir. 2014).

The Prison Litigation Reform Act imposes additional requirements on prisoner litigants who seek preliminary injunctive relief against prison officials and requires that any injunctive relief be narrowly drawn and the least intrusive means necessary to correct the harm. 18 U.S.C. § 3626(a)(2); *see Gilmore v. People of the State of Cal.*, 220 F.3d 987, 999 (9th Cir. 2000).

“The urgency of obtaining a preliminary injunction necessitates a prompt determination” and makes it difficult for a party to procure supporting evidence in a form that would be admissible at trial. *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). As a result, “a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). In its determination on a motion for a preliminary injunction, “a court may properly consider evidence that would otherwise be inadmissible at trial.” *Cherokee Inc. v. Wilson Sporting Goods Co.*, No. CV 15-04023 BRO (Ex), 2015 WL 3930041, at *3 (C.D. Cal. June 25, 2015); *see Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009) (district court did not abuse its discretion by considering “unverified client complaints” and the plaintiff’s counsel’s interested declaration when it granted a preliminary injunction); *Flynt Distrib. Co.*, 734 F.2d at 1394 (the district court has discretion to rely on hearsay statements when deciding whether to issue a preliminary injunction). A court may also consider evidence or developments that postdate the pleadings. *Farmer v. Brennan*, 511 U.S. 825, 846 (1994).

When evaluating the merits of a preliminary injunction motion, a court's factual findings and legal conclusions are not binding at trial on the merits. *Univ. of Tex.*, 451 U.S. at 395.

III. Conclusions of Law

Plaintiff seeks an order requiring Defendants to provide him (1) "the necessary pain medication to treat his constant severe pain," (2) "rehousing to a unit that has wheelchair transferring assistance available at all times," and (3) referral to an orthopedic surgeon "to evaluate Plaintiff for possible surgical intervention to treat and improve his spinal condition." (Doc. 109 at 15.) Based on the hearing and Dr. Davidson's recommendation, it is clear Plaintiff is seeking a resumption of his previous Tramadol prescription and the epidural injection(s) recommended by Dr. Feiz-Erfan. Because Plaintiff is not currently prescribed Tramadol and or received epidural injections as of the hearing date, he is seeking mandatory, rather than prohibitory, injunctive relief, with respect to his pain relief as well as his requests to be rehoused in a different unit with wheelchair transfer assistance available at all times and an evaluation by an orthopedic surgeon.

A. Pain Relief

1. Likelihood of Success on the Merits

To establish a likelihood of success on the merits of an Eighth Amendment medical care claim, a prisoner must demonstrate "deliberate indifference to serious medical needs." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). The prisoner must show (1) that his condition constitutes a "serious medical need" and (2) that the defendant's current response to that need is deliberately indifferent. *Jett*, 439 F.3d at 1096; see *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (where a plaintiff seeks injunctive relief, the deliberate indifference determination is based on the defendant's current conduct).

a) Serious Medical Need

Plaintiff has satisfied the objective prong of the deliberate indifference analysis. In the Court's January 12, 2021 Order on Plaintiff's previous request for injunctive relief, the

1 Court found no meaningful dispute that Plaintiff suffers from severe spinal pain, a serious
 2 medical condition. (Doc. 87 at 9.) Moreover, Centurion Defendants do not dispute that
 3 Plaintiff suffers from degenerative disc disease. (Doc. 114 at 3.) Indeed, Plaintiff's
 4 condition causes him chronic and severe pain that medical personnel have found worthy of
 5 attention and treatment. *See McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992),
 6 *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir.
 7 1997).

8 **b) Deliberate Indifference**

9 With respect to the subjective prong, a plaintiff must first show that the defendant
 10 was “subjectively aware of the serious medical need[.]” *Simmons v. Navajo Cnty., Ariz.*,
 11 609 F.3d 1011, 1017–18 (9th Cir. 2010) (quotation and citation omitted). A defendant's
 12 knowledge of a serious medical need or substantial risk to health “is a question of fact
 13 subject to demonstration in the usual ways, including inference from circumstantial
 14 evidence,” and a defendant may be found to have known of a substantial risk if the risk
 15 was obvious. *Farmer*, 511 U.S. at 842.

16 Here, there can be no dispute that Centurion Defendants are aware of Plaintiff's
 17 diagnosed condition and serious medical need because it is documented in his medical
 18 records showing decades of treatment for his spinal condition, including surgeries,
 19 medication trials, MRIs, and specialist appointments. Moreover, an orthopedic surgeon
 20 has recommended that Plaintiff have, at a minimum, palliative measures such as Tramadol
 21 and epidural injections, and a neurosurgeon has recommended epidural injection(s) and
 22 physical therapy.

23 After showing that a defendant was subjectively aware of the serious medical need,
 24 a plaintiff must show that the defendant “failed to adequately respond” to that need.
 25 *Simmons*, 609 F.3d at 1018. Prison officials are deliberately indifferent to a prisoner's
 26 serious medical needs when they deny, delay, or intentionally interfere with medical
 27 treatment.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (internal citations and
 28 quotation marks omitted). Deliberate indifference may also be shown by the way in which

1 prison officials provide medical care, *Hutchinson v. United States*, 838 F.2d 390, 394 (9th
2 Cir. 1988), or “by a purposeful act or failure to respond to a prisoner’s pain or possible
3 medical need.” *Jett*, 439 F.3d at 1096.

4 In the January 12, 2021 Order denying injunctive relief, the Court noted that
5 Defendant Olmstead was taking steps to address Plaintiff’s pain by means other than
6 Tramadol, including seeking authorization for MRIs of Plaintiff’s lumbar and cervical
7 spine to assess whether there was further deterioration, which could support surgery or
8 epidural spinal injections, and providing lidocaine pain patches. (Doc. 87 at 10.) However,
9 at that time, the Court informed Defendants that a prolonged failure to address Plaintiff’s
10 severe pain through other means may warrant consideration of a new motion for injunctive
11 relief. (*Id.* at 10-11.)

12 While Plaintiff had the lumbar and cervical spine MRIs on January 8, 2021, he did
13 not see the neurosurgeon until June 25, 2021, which Centurion Defendants assert was the
14 earliest appointment available to see the neurosurgeon. (Doc. 114 at 4 n.2). But Olmstead
15 did not submit a consultation request for Plaintiff to see the neurosurgeon until April 6,
16 2021—three months after the MRIs were completed. There is no explanation for this three-
17 month delay in attempting to obtain authorization for the neurosurgery consult. When
18 Plaintiff saw the neurosurgeon in June 2021, the neurosurgeon wanted a new MRI, and
19 when Plaintiff returned to the neurosurgeon on July 30, 2021, the neurosurgeon
20 recommended epidural injections, physical therapy, and follow up in three months.
21 Afterwards, Defendant Olmstead only submitted a routine consultation request for epidural
22 lumbar injections, and as of the date of the hearing, October 29, 2021, Plaintiff had not had
23 an epidural injection. Plaintiff has had physical therapy sessions at the prison, but they
24 caused him more discomfort than benefit.

25 Centurion Defendants argue there is no evidence Plaintiff has been denied
26 appropriate medical care and that he simply disagrees with the medical providers who have
27 changed his pain medication from a narcotic to a non-narcotic. (Doc. 114 at 6.) They
28 assert that “alternative means to treat Plaintiff’s pain, including epidural steroid injections

1 and/or additional surgery, are currently being evaluated by the appropriate specialists.”⁵
 2 (*Id.* at 4.)

3 Centurion Defendants have provided no explanation why Tramadol was appropriate
 4 for ten years and is suddenly inappropriate, requiring immediate cessation, or how the
 5 minimal pain relievers Plaintiff has received outside of the hospital or infirmary have been
 6 adequate to treat his significant pain issues. Defendant Olmstead makes the conclusory
 7 statement that “the medical decision has been made, after repeat examinations and other
 8 testing, that [Plaintiff] needs to be weaned off of narcotics, including Tramadol, due to
 9 poor tolerance/side effects . . . and that there is no medical indication to continue this
 10 medication.” (Doc. 114-6 at 2.) Olmstead, though, does not say how Plaintiff manifested
 11 “poor tolerance/side effects” or point to any medical records showing poor tolerance/side
 12 effects to Tramadol. Nor does she explain why, if Plaintiff had poor tolerance/side effects
 13 to Tramadol which would contraindicate its use, he has been prescribed Tramadol while in
 14 the hospital and prison infirmary. Olmstead does say that Plaintiff “is still being prescribed
 15 some pain medication, including a topical aspercream [sic] lidocaine patch to place on his
 16 lower back for pain, due to the lower risk of drug interaction and side effects, especially
 17 with [Plaintiff’s] advancing age the fact that he is a fall risk.” (Doc. 114-6 at 2 ¶ 5.) But
 18 Olmstead does not address the history of falls Plaintiff has had since his regular Tramadol
 19 prescription was stopped in September 2020 or how Tramadol has increased the likelihood
 20 of falls by Plaintiff. Moreover, Dr. Davidson, who reviewed Plaintiff’s medical records
 21 and evaluated Plaintiff by telephone, did not attribute the falls to Tramadol use and
 22 recommends that a “prescribed moderate dose of Tramadol should be sustained,” noting
 23 Tramadol’s “prior effectiveness and its lack of side-effects over the span of many years.”
 24 (Doc. 109 at 29 ¶ 41.) Dr. Feiz-Erfan has recommended epidural injection(s), and,
 25 although Centurion Defendants indicated at the hearing that Plaintiff would have an
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27
 28 ⁵ Defendants made this argument before Plaintiff saw Dr. Feiz-Erfan for the second
 time on July 30, 2021.

1 injection around mid-November, it is unknown if Plaintiff will receive more than one
2 injection or on a regular basis, as Dr. Davidson indicates may be necessary.

3 Centurion Defendants' post-hearing evidence of an unwritten policy that opiates
4 only be prescribed for cancer patients with severe pain, terminal illness with pain, or other
5 long-term disease implicating severe pain symptoms is unpersuasive, especially
6 considering Plaintiff's past use of Tramadol for over ten years in the prison setting when
7 Plaintiff was neither a cancer patient nor had a terminal illness. Specifically, the Court
8 finds the policy unpersuasive because there was no evidence that it was based on a patient
9 specific medical justification or a penological justification. Moreover, it appears Plaintiff's
10 pain may fall under the unwritten policy's category of "long-term disease implicating
11 severe pain symptoms."

12 Of particular concern to the Court is Centurion Defendants' delay of more than a
13 year of treating Plaintiff's severe pain with something as effective as Tramadol. *See Hallet*,
14 296 F.3d at 744; *Jett*, 439 F.3d at 1096. Plaintiff's expert, who has interviewed and
15 evaluated Plaintiff, recommended in June 2021 that Plaintiff be prescribed Tramadol on an
16 ongoing basis, but Plaintiff has only received Tramadol when hospitalized or in the
17 infirmary. Defendants finally sent Plaintiff to a specialist this summer, who recommended
18 on July 30, 2021 that Plaintiff receive epidural injections and follow-up in three months,
19 but Plaintiff had not received those injections as of October 29, 2021, and was not
20 scheduled to receive an injection until sometime in November 2021, and there is no
21 evidence that a follow-up appointment with Dr. Feiz-Erfan has been scheduled. The Ninth
22 Circuit and other courts have routinely found that failure to follow a specialist's
23 recommendation may amount to a course of treatment that is medically unacceptable. *See*
24 *Colwell v. Bannister*, 763 F.3d 1060, 1069 (9th Cir. 2014) (denying summary judgment
25 where prison officials "ignored the recommendations of treating specialists and instead
26 relied on the opinions of non-specialist and non-treating medical officials who made
27 decisions based on an administrative policy"); *Snow v. McDaniel*, 681 F.3d 978, 988 (9th
28 Cir. 2012) (where the treating physician and specialist recommended surgery, a reasonable

jury could conclude that it was medically unacceptable for the non-treating, non-specialist physicians to deny recommendations for surgery), *overruled in part on other grounds by Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014); *Jones v. Simek*, 193 F.3d 485, 490 (7th Cir. 1999) (the defendant physician’s refusal to follow the advice of treating specialists could constitute deliberate indifference to serious medical needs); *McNearney v. Wash. Dep’t of Corrs.*, C11-5930 RBL/KLS, 2012 WL 3545267, at *26 (W.D. Wash. June 15, 2012) (in granting a preliminary injunction for specialist treatment, the district court found that the prisoner plaintiff showed a likelihood of success on the merits of her Eighth Amendment claim where the defendants failed to follow an orthopedic surgeon’s strong recommendation for further orthopedic evaluation). In addition, a failure to competently treat a serious medical condition, even if some treatment is prescribed, may constitute deliberate indifference in a particular case. *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989) (“access to medical staff is meaningless unless that staff is competent and can render competent care”); *see Estelle*, 429 U.S. at 105 & n.10 (the treatment received by a prisoner can be so bad that the treatment itself manifests deliberate indifference); *Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (prisoner does not have to prove that he was completely denied medical care).

Based on this record, Plaintiff has shown a likelihood of success on the merits of his deliberate indifference claim regarding the treatment of his pain. While up until the time of the hearing Plaintiff had received minimal treatment, the evidence shows that treatment is inadequate. And, the continual delays in providing adequate alternative pain management also support that Plaintiff will succeed on the merits of this claim. A reasonable jury could find that, in these circumstances, Centurion Defendants failed to competently treat Plaintiff’s serious pain needs and acted with deliberate indifference.

2. Irreparable Injury

In addition to showing a likelihood of success, Plaintiff must demonstrate that absent an injunction, he will be exposed to irreparable harm. *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th 1988) (speculative injury is not irreparable

injury sufficient for a preliminary injunction); *see Winter*, 555 U.S. at 22. To support a mandatory preliminary injunction for specific medical treatment, a plaintiff must demonstrate ongoing harm or the present threat of irreparable injury, not a past injury. *See Conn. v. Mass.*, 282 U.S. 660, 674 (1931) (an injunction is only appropriate “to prevent existing or presently threatened injuries”); *Caribbean Marine*, 844 F.2d at 674. “[T]here must be a presently existing threat of harm, although injury need not be certain to occur.” *Villaneuva v. Sisto*, CIV S-06-2706 LKK EFB P, 2008 WL 4467512, at *3 (E.D. Cal. Oct. 3, 2008) (citing *FDIC v. Garner*, 125 F.3d 1272, 1279–80 (9th Cir. 1997)). Pain can constitute irreparable harm. *See Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004) (irreparable harm includes delayed and/or complete lack of necessary treatment, and increased pain); *McNearney*, 2012 WL 3545267, at *14 (finding a likelihood of irreparable injury where the plaintiff’s medical condition predated her incarceration and had not worsened, but the evidence showed that she continued to suffer unnecessary pain due to the defendants’ inadequate treatment plan); *Von Collin v. Cnty. of Ventura*, 189 F.R.D. 583, 598 (C.D. Cal. 1989) (“Defendants do not argue that pain and suffering is not irreparable harm, nor could they”).

Prior to his kidney issues earlier this year, Plaintiff reported to Dr. Davidson that his pain was constant at 8 out of 10, he suffers “incomprehensible pain” when he transfers to and from the wheelchair, a history of falls, that the pain is only somewhat lessened by remaining in a seated position, that he cannot lie down at all, and he only sleeps sporadically. After Plaintiff’s treatment for kidney issues, his pain is now at 9 out of 10, his ability to transfer has decreased even more, and his sleep is even more compromised.

Plaintiff’s ongoing severe pain and associated issues are sufficient to support a finding of irreparable harm. *See Estelle*, 429 U.S. at 103 (Eighth Amendment applies even to “less serious cases, [where] denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose”); *McGuckin*, 974 F.2d at 1060 (pain and anguish suffered by prisoner constituted harm sufficient to support a § 1983 action).

3. Balance of Hardships

Courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24 (quotation omitted). The Ninth Circuit has held that the interest in protecting individuals from physical harm outweighs a government entity’s monetary costs. *See Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (“faced with [] a conflict between financial concerns and preventable human suffering, [the court has] little difficulty concluding that the balance of hardships tips decidedly in plaintiff’s favor”) (quotation omitted).

Centurion Defendants argue that “restructuring the procedures and policies for one single inmate could result in security and safety breaches, inmate unrest and staffing issues, particularly where the relief sought is not necessary or is already being processed.” (Doc. 114 at 9-10.) They further argue that the relief requested would trigger federalism concerns and cause the Court to needlessly interfere with the prison’s operations.

The Court is unconvinced by Centurion Defendants’ general argument, without any citation to any procedures or policies, that “restructuring the procedures and policies for one single inmate could result in security and safety breaches [and] inmate unrest and staffing issues.” The Court is also unconvinced that granting Plaintiff pain relief would result in needless interference in the prison’s operations.

As articulated above, Plaintiff is likely to suffer irreparable injury absent an injunction; thus, his injury is more than just speculative. Furthermore, Centurion Defendants have made no showing that they will face any harm if an injunction issues. The Court finds that the balance of hardships tips sharply in Plaintiff’s favor.

4. Public Interest

“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation omitted). Moreover, “the public has a strong interest in the provision of constitutionally-adequate health care to prisoners.” *McNearney*, 2012 WL 3545267, at *16 (quoting *Flynn v. Doyle*, 630 F. Supp. 2d 987, 993 (E.D. Wis. 2009)); *see Farnam v. Walker*, 593 F. Supp.

1 2d 1000, 1017 (C.D. Ill. 2009) (holding that public had an interest in the maintenance of
2 prisoner's health during the pendency of the lawsuit).

3 Centurion Defendants argue that granting injunctive relief "would not be in the
4 public interest because it would require this Court to override the decisions of correctional
5 authorities and medical providers, who are responsible for the safety, security, care and
6 efficient operation of the prison, as well as for the healthcare of Plaintiff." (Doc. 114 at
7 10.) They further contend that "the public welfare militates against the issuance of
8 extraordinary relief in the prison context, absent a sufficient showing of a violation of
9 constitutional rights." (*Id.*)

10 Contrary to Centurion Defendants' assertions, the record supports Plaintiff's claims
11 that he is suffering significant pain, sleeplessness, and related issues and is being denied
12 constitutionally adequate medical care for his pain. The Court finds that it is in the public
13 interest to prevent Plaintiff from suffering ongoing pain and other complications during the
14 remainder of this lawsuit. Accordingly, this factor favors injunctive relief that requires
15 Centurion Defendants to provide the epidural injection(s) recommended by Dr. Feiz-Erfan
16 and to re-start Plaintiff's prescription for Tramadol, unless a specialist recommends an
17 alternative pain medication.

18 **5. Narrowly Tailored Relief**

19 As stated, the PLRA requires any injunctive relief to be narrowly drawn and the
20 least intrusive means necessary to correct the harm. 18 U.S.C. § 3626(a)(2). Centurion
21 Defendants do not address this factor.

22 As noted, Plaintiff wants his prescription for Tramadol re-started, as recommended
23 by Dr. Davidson, and the epidural injection(s) recommended by Dr. Feiz-Erfan. Adhering
24 to the specialists' recommendations is the most narrowly drawn relief necessary to correct
25 the harm identified by Plaintiff. Thus, Plaintiff's request for relief satisfies the
26 requirements of the PLRA.

27 **6. Bond Requirement**

1 Rule 65(c) of the Federal Rules of Civil Procedure provides that “[t]he court may
 2 issue a preliminary injunction or a temporary restraining order only if the movant gives
 3 security in an amount that the court considers proper to pay the costs and damages sustained
 4 by any party found to have been wrongfully enjoined or restrained.” Despite this
 5 mandatory language, “Rule 65(c) invests the district court with discretion as to the amount
 6 of security required, if any.” *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009)
 7 (internal quotation omitted). The district court may dispense with the filing of a bond when
 8 it concludes there is no realistic likelihood of harm to the defendant from enjoining his or
 9 her conduct. *Id.*

10 Here, Centurion Defendants have not requested a bond or submitted any evidence
 11 regarding likely damages. Accordingly, the Court will waive the bond requirement.

12 Having met all requirements for injunctive relief, the Court will require Centurion
 13 Defendants to provide Plaintiff with the epidural injection(s) and to re-start Plaintiff’s
 14 prescription for Tramadol, unless a specialist recommends an alternative pain medication.

15 **B. Housing**

16 As to Plaintiff’s request for different housing, ADC Defendants argue that this relief
 17 is wholly unrelated to the remaining claims in this lawsuit and therefore inappropriate.
 18 (Doc. 118 at 5.) In his First Amended Complaint, Plaintiff alleged that on July 12, 2019,
 19 Defendant Days moved Plaintiff from the death-row wheelchair pod to the death-row
 20 security threat group pod and housed Plaintiff in a cell without handicap bars, causing
 21 Plaintiff to fall repeatedly while transferring to and from his wheelchair to his bunk and
 22 toilet. (Doc. 36 at 5, 14.) ADC Defendants point out that the prison has now installed grab
 23 bars in Plaintiff’s cell and the specific areas of the prison he requested. (Doc. 118 at 5,
 24 citing Doc. 61; *see also* Doc. 37 at 28 (denying as moot Plaintiff’s request for grab bars in
 25 his cell and shower).) Plaintiff does not address ADC Defendants’ argument that his
 26 request for a transfer to a different unit is unrelated to his existing claims or requested relief.

27 “[T]here must be a relationship between the injury claimed in the motion for
 28 injunctive relief and the conduct asserted in the underlying complaint.” *Pac. Radiation*

Oncology, LLC v. Queen's Med. Center, 810 F.3d 631, 636 (9th Cir. 2015); *see Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (affirming denial of a preliminary injunction request based on alleged retaliatory conduct unrelated to the basis of a prisoner's § 1983 claim). Plaintiff's requested relief for a transfer is unrelated to his claim about the lack of handicap bars in his cell and certain areas of the prison, which have been resolved, and there is no existing claim regarding 24-hour transfer assistance or that Plaintiff has requested and been denied such assistance. Accordingly, the Court will deny this request for relief.

C. Surgical Evaluation

Plaintiff filed his Motion on June 22, 2021, seeking "an immediate evaluation by an orthopedic specialist to determine available surgical options that could treat and improve his condition." (Doc. 109 at 2.) Plaintiff's expert, Dr. Davidson, recommended an evaluation by either an orthopedic spine surgeon or neurosurgeon to determine his surgical options. In his Reply, Plaintiff states that he "asked this Court to order an evaluation with a neurosurgeon, and although he "was evaluated by such a specialist in late June, nothing has yet come of that evaluation and consult." (Doc. 125 at 5 n.2.) After he filed his Reply on July 19, 2021, Plaintiff saw Dr. Feiz-Erfan a second time—on July 30, 2021—and Dr. Feiz-Erfan recommended epidural injection(s) to relieve Plaintiff's pain. Dr. Feiz-Erfan did not include any recommendations or comments regarding surgical options in his report.

Because Plaintiff has now been evaluated by a neurosurgeon, and the Court has already ordered compliance with Dr. Feiz-Erfan's recommendations for epidural injection(s), this request for injunctive relief is moot.

IT IS ORDERED:

(1) The reference to the Magistrate Judge is withdrawn as to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 109).

(2) Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 109) is **granted in part** as follows:

1 (a) Within **ten (10) days** of the date of this Order, Centurion Defendants
2 must re-start Plaintiff's prior prescription for Tramadol, unless a specialist has
3 recommended an equally effective alternative pain medication.

4 (b) Within **ten (10) days** of the date of this Order, Centurion Defendants
5 must schedule the epidural injection(s) recommended by Dr. Feiz-Erfan unless the
6 injection(s) have already occurred.

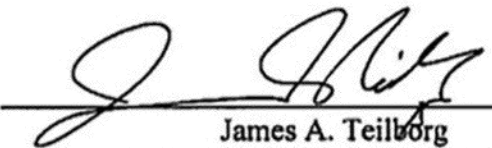
7 (c) Centurion Defendants must file a Notice with the Court within 20 days
8 of the date of this Order, that Plaintiff has been re-started on Tramadol, or on an
9 equally effective alternative pain medication recommended by a specialist, has
10 received at least one epidural injection, and when any future injections are
11 scheduled.⁶

12 (d) This relief is narrowly drawn, extends no further than necessary to
13 correct the harm, and is the least intrusive means necessary to correct the harm. *See*
14 18 U.S.C. § 3626(a)(2).

15 (e) Plaintiff is not required to post bond.

16 (3) The Motion is otherwise **denied**.

17 Dated this 7th day of December, 2021.

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James A. Teilborg
Senior United States District Judge

⁶ The Court recognizes that for security reasons, it may not be appropriate for Defendants to divulge the exact dates and times of the scheduled appointments for injections. But Defendants' Notice must include the week(s) in which the injection(s) are scheduled. Defendants may redact the day—but not the month or year—of the appointments or may seek to file the dates under seal for ex parte review.

CHAPTER: 700

Operational Security

DEPARTMENT ORDER:

710 – Execution Procedures

**OFFICE OF PRIMARY
RESPONSIBILITY:**

OPS

Effective Date:

June 13, 2017

Amendment:

March 10, 2021

Supersedes:

DO 710 (5/30/17)

Scheduled Review Date:

N/A

ACCESS

☐ **Contains Restricted Section(s)**

Arizona Department of Corrections Rehabilitation and Reentry



Department Order Manual

A handwritten signature in black ink, appearing to read "David Shinn", is written over a horizontal line.

David Shinn, Director

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PURPOSE

This Department Order establishes procedures for planning and carrying out the execution of a person convicted of a capital offense and sentenced to death. These procedures shall be followed as written, except that the Director of the Arizona Department of Corrections, Rehabilitation and Reentry (Director) is allowed to make limited deviations from or adjustments to these procedures when required to address certain unexpected or otherwise unforeseen contingencies, subject to the limitations on the Director's discretion as set forth herein. Except as expressly permitted herein, the Director shall not have any authority to deviate from or make adjustments to any material aspects of the execution process, including, but not limited to, the execution chemicals or dosages, consciousness checks, the access of the press and the inmate's counsel to the execution, and the timeframes established by this Department Order.

RESPONSIBILITY

The Department ensures the execution of a person sentenced to death under State law by a court of competent authority and jurisdiction is carried out in keeping with statute, case law and professional practices.

The Department shall make every effort in the planning and preparation of an execution to ensure the execution process:

- Faithfully adheres to constitutional mandates against cruel and unusual punishment.
- Is handled in a manner that minimizes its impact on the safety, security and operational integrity of the prison and the community in which it occurs.
- Accommodates the public's right to obtain certain information concerning the execution.
- Reasonably addresses the privacy interests of persons as provided by law.
- Provides contingency planning to identify and address unforeseen problems.
- Allows for stays of execution, commutations and other exigencies up to the time that the sentence is imposed.
- Provides opportunity for citizens to exercise their First Amendment rights to demonstrate for or against capital punishment in a lawful manner.
- Ensures there is an appropriate response to unlawful civil disobedience, trespass and other violations of the law by any person attempting to interfere with the execution or the operation of the prison.

The Department shall detain, seek the arrest and encourage prosecution of persons whose conduct includes:

- Violating prohibitions against filming, taping, broadcasting or otherwise electronically documenting the execution of the inmate.
- Trespassing and otherwise entering upon Department property without authorization.
- Participating in unlawful demonstrations or unlawfully attempting to disrupt, prevent and otherwise interfere with the execution.
- Unlawfully threatening, intimidating and otherwise attempting to influence authorized persons involved in the execution process.
- These prohibitions apply to the inmate population as well as department personnel and members of the general public engaging or attempting to engage in disruptive and other prohibited behaviors.

Participating staff shall adhere to the Department's Code of Ethics and Guided Principles, evidencing:

- Appropriate levels of professionalism, restraint and courtesy when interacting with witnesses, demonstrators, attorneys, news media, state and local law enforcement and any other member of the public directly and indirectly involved with the imposition of the sentence of death.
- All assigned duties are performed proficiently and professionally.
- Their ability to exercise the option to withdraw from the process by the prescribed means at any time.
- Conduct that appropriately reflects the solemnity of the activities in which they elect to engage and the duties they choose to perform.
- Reserving public comment on any and all facets of the execution except as expressly provided in Department Order #201, Legal Services - Records Release.
- Any Department employee who learns of identifying information regarding any person who participates in or performs any function of an execution must keep that information confidential.

IMPORTANT GUIDELINES REGARDING CONFIDENTIALITY AND VOLUNTARINESS OF PARTICIPATION IN AN EXECUTION:

- The anonymity of any person, as defined in A.R.S. §1-215(28) and A.R.S. §13-105(30), who participates in or performs any ancillary function(s) in the execution, including the source of the execution chemicals, and any information contained in records that would identify those persons are, as required by statute, to remain confidential and are not subject to disclosure. A.R.S. §13-757(C).
- All team members serve on a strictly voluntary basis. At any point before, during or after an execution any team member may decline to participate or participate further without additional notice and explanation or repercussion.
- The Assistant Director for Prison Operations shall ensure all team members understand and comply with the provisions contained herein.

PROCEDURES

1.0 DIRECTOR'S OFFICE RESPONSIBILITIES UPON NOTICE THAT THE STATE HAS FILED A MOTION FOR WARRANT OF EXECUTION

1.1 Upon notice from the Attorney General's Office that it has filed a Motion for Warrant of Execution in the Arizona Supreme Court:

1.1.1 General Counsel shall:

1.1.1.1 Notify the Director, Assistant Director for Prison Operations, the Wardens of ASPC-Florence and ASPC-Eyman or ASPC-Perryville, and the Media Relations Director.

1.1.1.2 Notify the Victim Services Team Leader, who shall contact the victim(s) and inform them that the State is seeking a Warrant of Execution.

1.1.2 The Director shall notify the inmate and the inmate's counsel in writing of the drug/lethal gas protocol that will be used in the event a Warrant of Execution is issued and the method of execution. *[Revision – March 10, 2021]*

2.0 COMPLEX AND DIRECTOR'S OFFICE RESPONSIBILITIES UPON RECEIPT OF WARRANT OF EXECUTION**2.1 Upon receipt of the Warrant of Execution from the Attorney General's Office:****2.1.1 General Counsel shall:**

- 2.1.1.1 Notify the Director, Assistant Director for Prison Operations, the Wardens of ASPC-Florence and ASPC-Eyman or ASPC-Perryville, and the Media Relations Office.
- 2.1.1.2 Forward the original Warrant of Execution to the Warden of ASPC-Florence.
- 2.1.1.3 Forward copies of the original Warrant of Execution to the Warden of ASPC-Eyman or ASPC-Perryville.
- 2.1.1.4 Notify the Victim Services Team Leader, who shall contact the victim(s) and inform them of the court's issuance of the Warrant of Execution.

2.1.2 The Director shall:

- 2.1.2.1 Select the time of execution and provide notice to the Arizona Supreme Court and the parties at least 20 calendar days prior to the execution date. (Arizona Rules of Criminal Procedures, Rule 31.17(c)(3))
- 2.1.2.2 Notify the inmate that if the offense was committed prior to November 23, 1992, the inmate shall choose in writing using the Method of Execution, Form 710-1, either lethal injection or lethal gas at least twenty-one days prior to the execution. If the inmate fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection (A.R.S. §13-757(B)).
- 2.1.2.3 Have the authority to change the timeframes established in this Department Order in order to address certain unexpected or otherwise unforeseen contingencies only with regard to minor or routine contingencies not central to the execution process.

2.1.3 The ASPC-Eyman or ASPC-Perryville Warden shall:

- 2.1.3.1 Direct the inmate to submit the Inmate Witness and Notification Information, Form 710-2, to the Warden no later than 14 days prior to the scheduled execution date.
 - 2.1.3.1.1 Inform the inmate that two clergy and five other persons may be invited to be present at the execution.
 - 2.1.3.1.2 Notify the inmate that minors are prohibited from witnessing the execution pursuant to A.R.S. §13-758.
 - 2.1.3.1.3 Notify the inmate that requests for Department or contract staff to attend the execution shall be denied.

- 2.1.3.1.4 Notify the inmate that requests for other inmates to attend the execution shall be denied.
- 2.1.3.2 Direct the inmate to review and update as necessary the Notification in Case of Accident, Serious Illness or Death and Disposition of Property, Form 711-1. The Warden shall direct the inmate to provide any changes no later than 14 days prior to the execution. If the inmate provides no instruction, the property and accounts shall be disposed in accordance with Department Order #711, Notification of Inmate Hospitalization or Death.
- 2.1.3.3 Advise the inmate that his/her body shall not be used for organ donation.
- 2.1.3.4 Summarize the options available with the inmate for release and disposition of their body after the autopsy is performed. The Warden shall direct the inmate to review the previously completed Disposition of Remains, Form 710-3, and update as necessary no later than 14 days prior to the execution. If the inmate provides no information or the information is insufficient or incorrect the deceased shall be disposed in accordance with Department Order #711, Notification of Inmate Hospitalization or Death.
- 2.1.3.5 Advise the inmate he may request a last meal by completing the Last Meal Request, Form 710-5, and returning it no later than 14 days prior to the execution. Reasonable effort shall be made to accommodate the request.

3.0 EXECUTION TEAM MEMBERS

- 3.1 The Assistant Director for Prison Operations shall:
 - 3.1.1 Establish a training schedule and identify dates for periodic on-site practice by the Housing Unit 9 Section Teams, to include 10 training scenarios within the 12 months preceding the scheduled execution.
 - 3.1.2 Conduct a minimum of two training sessions with multiple scenarios 2 days prior to the scheduled execution. The IV Team members shall participate in at least one training session with multiple scenarios within one day prior to the scheduled execution.
 - 3.1.2.1 All training sessions shall be documented and be included as part of a permanent record created by the ASPC-Florence Warden to be submitted to the Department's General Counsel for archive, post execution.
 - 3.1.3 Ensure periodic testing of all of the equipment in Housing Unit 9 occurs, affirming electrical, plumbing, heating and air conditioning units are in working order and the gas chamber is maintained.

- 3.2 The Assistant Director for Prison Operations provides for the planning and overall direction of all pre-execution, execution and post-execution activities. The Assistant Director coordinates the activities of the Southern and Northern Regional Operations Directors (SROD and NROD) and the ASPC-Eyman or ASPC-Perryville and ASPC-Florence Wardens who activate the following teams and oversee their activities, specifically:

3.2.1 Command

- 3.2.1.1 Consists of a minimum of three team members:

3.2.1.1.1 Commander

3.2.1.1.2 Recorder

3.2.1.1.3 Telephone operator

3.2.1.1.4 Others as necessary

- 3.2.1.2 Team members are selected by the Assistant Director for Prison Operations with the documented approval of the Director.

- 3.2.1.3 Its team leader is selected by the Assistant Director for Prison Operations.

- 3.2.1.4 Primary function of Command is the overall coordination of execution procedures.

3.2.2 Housing Unit 9 Section

- 3.2.2.1 Consists of a section leader and two teams:

3.2.2.1.1 Restraint Team

3.2.2.1.2 Special Operations Team

- 3.2.2.2 Team leaders are selected by the Assistant Director for Prison Operations with the documented approval of the Director.

- 3.2.2.3 The section leader is the ASPC-Florence Warden.

- 3.2.2.4 Primary function of the section leader is the overall coordination of activities of the Restraint Team and the Special Operations Team to ensure compliance with conditions of confinement and application of approved procedures.

3.2.3 Restraint Team

- 3.2.3.1 Consists of a minimum of seven team members, including one team leader.

- 3.2.3.2 Restraint Team members and the team leader are selected by the Assistant Director for Prison Operations with the documented approval of the Director.

- 3.2.3.3 Primary function of the Restraint Team is to provide continuous observation of the inmate on the day of the execution and apply appropriate restraint procedures and inmate management prior to, during and after the execution.
- 3.2.4 Special Operations Team
 - 3.2.4.1 Consists of a minimum of five team members:
 - 3.2.4.1.1 Team Leader
 - 3.2.4.1.2 Recorder
 - 3.2.4.1.3 Three additional team members
 - 3.2.4.2 Its team members and team leader are selected by the Assistant Director for Prison Operations with the documented approval of the Director.
 - 3.2.4.3 The Special Operations Team Leader shall designate functions of the other team members, including the selection of a member to observe the procedure and serve as the Recorder.
 - 3.2.4.4 Primary function of the Special Operations Team is to implement the protocols associated with the execution with its primary duty being the administration of the chemicals, and additionally mixing the chemicals under the direct supervision of the IV Team Leader.
- 3.2.5 Intravenous Team Members (IV Team)
 - 3.2.5.1 The IV Team will consist of any two or more of the following: physician(s), physician assistant(s), nurse(s), emergency medical technician(s) (EMTs), paramedic(s), military corpsman or other certified or licensed personnel including those trained in the United States Military. All team members shall be currently certified or licensed within the United States to place IV lines.
 - 3.2.5.2 The IV Team members shall be selected by the Director. Selection of any team member shall include a review of the proposed team member's qualifications, training, experience, and/or any professional license(s) and certification(s) they may hold. Licensing and criminal history reviews shall be conducted, by the Inspector General's Office prior to assigning or retaining any IV Team member and upon the issuance of a Warrant of Execution.
 - 3.2.5.3 The Director shall designate the IV Team Leader. The Assistant Director for Prison Operations shall ensure all team members thoroughly understand all provisions contained herein as written and by practice.

- 3.2.5.4 The IV Team shall be responsible for inserting either peripheral IV catheters or a central femoral line as determined by the Director acting upon the recommendation of the IV Team Leader. The IV Team Leader shall ensure all lines are functioning properly throughout the procedure, supervise the Special Operations team in the mixing of the chemicals, preparing the syringes, and monitoring the inmate (including the level of consciousness and establishing the time of death). The IV Team Leader shall supervise the administration of the chemicals. A central femoral venous line shall not be used unless the person placing the line is currently qualified by experience, training, certification or licensure within the United States to place a central femoral line.
- 3.2.5.5 IV Team members shall only be required to participate in the training sessions scheduled for one day prior to the actual execution.
- 3.2.5.6 Documentation of IV Team members' qualifications, including training of the team members, shall be maintained by the Department Director or his designee.
- 3.2.6 Maintenance Response Team (MRT)
 - 3.2.6.1 Consists of three team members and a team leader, and reports to Command.
 - 3.2.6.2 Team members are selected by the ASPC-Florence Warden.
 - 3.2.6.3 Primary function of MRT is to test all Housing Unit 9 equipment utilized to impose the sentence of death and to ensure electrical, plumbing, heating and air conditioning units are in working order.
- 3.2.7 Critical Incident Response Team (CIRT)
 - 3.2.7.1 Consists of three team members and a team leader, and reports to Command.
 - 3.2.7.2 The leader is the Employee Relations Administrator or designee.
 - 3.2.7.3 Team members are CIRT responders and selected by the Employee Relations Administrator.
 - 3.2.7.4 Primary function of CIRT is to educate staff regarding possible psychological responses and effective coping mechanisms to affected staff at all levels in the Department prior to, during and after the execution. CIRT shall provide ongoing follow up contact to staff.
- 3.2.8 Traffic Control Team
 - 3.2.8.1 Consists of eight team members and a team leader, and reports to Command.
 - 3.2.8.2 Team members and the team leader are selected by the Assistant Director for Prison Operations.

3.2.8.3 Primary function is to confer with state and local law enforcement agencies, establish check points and parameters for traffic control and formulate inter-agency emergency response strategies. The team also coordinates the ingress/egress for Department and contract staff and other persons whose attendance is necessary at ASPC-Eyman or ASPC-Perryville and ASPC-Florence. The Team's focus is the period of time starting twenty-four hours prior to the execution and concluding when normal activities resume after the execution.

3.2.9 Escort Team

3.2.9.1 Consists of eight team members and a team leader, and reports to Command.

3.2.9.2 Team members and the team leader are selected by the Assistant Director for Prison Operations.

3.2.9.3 Primary function is to coordinate the movement of all pre-approved witnesses on and off prison grounds and within its perimeter. One Escort Team is assigned to escort and assist pre-approved official, victim, media, and inmate witnesses. Escort team members always remain with witnesses within the established perimeter.

3.2.10 Victim Services Team

3.2.10.1 Consists of two team members and reports to the Escort Team leader.

3.2.10.2 The team leader is the Victim Services Office Administrator.

3.2.10.3 Primary function is to ensure victims of the crime that resulted in the imposition of death are informed of the execution date and their opportunity to witness the execution. The team explains the execution process. If the victim is interested in attending, the team submits the victim's name(s) for consideration.

3.2.10.4 Day of the Execution – The team leader meets with the victim(s) in a predetermined staging area and accompanies them throughout the process, including a briefing by the Director or the Director's designee. The Team provides support and advocacy as appropriate.

3.2.10.5 If the victim(s) is interested in speaking with the media after the execution, the victim(s) is escorted to the Press Room for brief media availability.

3.2.10.6 Post-Execution - The team leader ensures the victim(s) receives follow up phone calls and support.

3.2.11 Population Assessment

3.2.11.1 Regional Operations Director:

3.2.11.1.1 Is responsible for the coordination of monitoring and evaluation of inmate activity at ASPC-Eyman and ASPC-Florence.

3.2.11.1.2 Continuously monitors and assesses the inmate population for any activity related to the execution or its impact on the prison's operation at ASPC-Eyman and ASPC-Florence.

3.2.11.2 ASPC-Perryville Warden:

3.2.11.2.1 Is responsible for the coordination of monitoring and evaluation of inmate activity at ASPC-Perryville.

3.2.11.2.2 Continuously monitors and assesses the inmate population for any activity related to the execution or its impact on the prison's operation.

3.3 Designation of ADC Staff and Others Selected to Assist with the Execution

3.3.1 The ASPC-Eyman or ASPC-Perryville and ASPC-Florence Wardens shall review the current teams' rosters and recommend retention and replacement of staff and alternates to the Assistant Director for Prison Operations.

3.3.2 The Assistant Director for Prison Operations shall evaluate the teams' composition and the Wardens' recommendations and forward final recommendations to the Director.

3.3.3 In the selection and retention of section leaders and Housing Unit 9 team members, the Assistant Director for Prison Operations shall consider:

3.3.3.1 No employee who was suspended or demoted in the past 12 months shall be considered. Any staff currently under investigation is also ineligible.

3.3.3.2 Special consideration may be given to staff with pertinent specialized training and qualifications.

3.3.3.3 Staff with less than two years employment with the Department shall not be considered.

3.3.3.4 No staff serving on any team shall be related to the inmate by blood or marriage or have any other legal relationship with the inmate, their family or the crime victim(s).

3.3.4 Staff participation in the execution process is strictly voluntary. No Department employee is required to attend or participate in an execution. Any staff volunteers may withdraw from performing their assigned duties specific to the execution at any time by advising their Team Leader, advising a Team Member or advising their immediate chain of command. All staff participating in the execution shall be required to sign a Notice of Execution Involvement, Form 710-8.

4.0 COMMUTATION HEARING PROCEEDINGS

4.1 The Arizona Board of Executive Clemency (ABOEC) shall advise the Department of its plans to convene a Commutation Hearing and its date and time. Upon receipt of the notice, the ASPC-Eyman or ASPC-Perryville Warden shall arrange for a location in which the Commutation Hearing will be held.

4.1.1 If the ABOEC Commutation Hearing is held at the prison, the Department shall:

4.1.1.1 Require those in attendance to adhere to dress code as outlined in Department Order #911, Inmate Visitation.

4.1.1.2 Comply with the open meeting laws as it applies to Board of Executive Clemency hearings pursuant to A.R.S. §38-431.08.

5.0 DESIGNATION OF WITNESSES BY DIRECTOR

5.1 The Director or designee shall be present during the execution.

5.1.1 The Director shall invite:

5.1.1.1 The Arizona Attorney General. A.R.S. §13-758.

5.1.1.2 Twelve or more reputable citizens, including up to five Arizona-market media.

5.1.1.3 The five official media witnesses selected as representatives, from media-print, television/cable, radio, and the local market where the crime occurred. These official media witnesses shall also agree to serve as pool reporters.

5.1.1.4 Law Enforcement and prosecutors from the jurisdiction where the crime occurred.

5.1.1.5 Any crime victims and survivors of the crime for which the sentence of death will be imposed, once the Victim Services Team identifies those persons and provides to the Director a list of victim witnesses within 14 days prior to the scheduled execution.

5.1.1.6 In the event that the inmate wishes to designate one or more of their attorneys or other members of their legal team (not to exceed a cumulative three persons) to witness the execution, then the inmate shall identify these witnesses twenty-one days prior to the execution, and these witnesses shall sign and timely submit an Official Witness Agreement (Form 710-6), whereupon the Director shall invite these witnesses to attend the execution in accordance with section 10, subsection 10.2.1.1 of this Department Order.

5.1.2 Minors shall not be permitted to witness an execution. A.R.S. §13-758.

5.1.3 All witnesses are subject to a records check. Selection to participate is contingent upon security clearance and Witness Agreement to adhere to the provisions stipulated in the Official Witness Agreement and Official Witness/Pool Reporters Agreements, Forms 710-6 and 710-7. The Director shall retain full discretion as to the selection of and any changes in the witnesses selected for each scheduled execution.

6.0 STATE AND LOCAL LAW ENFORCEMENT BRIEFING; SITE CHECKS

- 6.1 The Assistant Director for Prison Operations shall ensure state and local law enforcement is periodically briefed and adequately prepared for the execution.
- 6.2 All of the equipment necessary to the administration of the execution shall be available on site and in good working order including:
 - 6.2.1 Transportation vehicles
 - 6.2.2 Communication devices with inter-operability capability and restricted frequencies
 - 6.2.3 Climate control
 - 6.2.4 Tool control
 - 6.2.5 Safety equipment
 - 6.2.6 Audio/visual equipment
 - 6.2.7 Utility infrastructure
 - 6.2.8 Key control/locking devices
 - 6.2.9 Medical emergency response capability
- 6.3 The Assistant Director for Prison Operations shall take all necessary steps to timely rectify deficiencies.

7.0 THIRTY-FIVE DAYS PRIOR TO THE DAY OF EXECUTION – COMPLEX

- 7.1 The Warden or designee of ASPC-Eyman or ASPC-Perryville shall confirm in writing the following steps were completed:
 - 7.1.1 Read the Warrant to the inmate.
 - 7.1.2 Outline for the inmate how conditions of confinement will be modified over the next thirty-five days and briefly describe the relevant aspects of the execution process.
 - 7.1.3 Offer the inmate the opportunity to contact their Attorney of Record by phone and to speak with a facility chaplain.
 - 7.1.4 Obtain the inmate's current weight and provide that information to the Assistant Director for Prison Operations and the Housing Unit 9 Section Leader.
 - 7.1.5 Transfer the inmate to the single-person cell on Death Row Browning or the Lumley Unit that has been retrofitted expressly for the purpose of holding the inmate.
 - 7.1.5.1 Before transferring the inmate into the cell, the inmate shall be strip searched, screened on the BOSS chair and then issued a new set of clothes and shoes to wear.
 - 7.1.5.2 The single-person cell shall be thoroughly searched prior to placing the inmate in the cell.

7.1.6 Place the inmate on 24-hour Continuous Observation and post staff to the inmate's cell on an on-going basis to maintain visual contact with the inmate until such time as the inmate is transferred to Housing Unit 9 at ASPC-Florence.

7.1.7 Establish an Observation Record to chronicle staff's observations of the inmate's activities and behavior until the sentence of death is imposed.

7.2 Conditions of Confinement – The ASPC-Eyman or ASPC-Perryville Warden shall:

7.2.1 Ensure none of the inmate's personal property is transferred with the inmate, except as provided in this section.

7.2.2 Have the inmate's personal property inventoried in their presence before the transfer of cells occurs and then have it boxed, sealed and removed from the cell. Store the inmate's property pending receipt of written instruction by the inmate regarding disposition of property or otherwise dispose of the property as outlined in section 2.0 of this Department Order.

7.2.3 Ensure all remaining property possessed by the inmate in the cell comply with indigent status items; any exceptions must be pre-approved in writing by the Assistant Director for Prison Operations.

7.2.4 Allow the inmate to keep in the cell one box each of legal and religious materials, a pencil and paper, and a book or periodical.

7.2.5 Issue the inmate a new mattress, pillow and bedding.

7.2.6 Provide the inmate limited hygiene supplies, including a towel and washcloth, and exchange these items on a daily basis.

7.2.7 Issue the inmate a clean set of clothing and bedding daily.

7.2.8 Ensure all inmate medications are unit-dosed and, when available issued in liquid form, and none of the inmate's medication including over-the-counter medications be dispensed or maintained by the inmate as Keep-on-Person.

7.2.9 Ensure the inmate has access to a department television set that is secured outside of the cell, and does not have access to any other appliances.

7.2.10 Continue to provide outdoor exercise and showers, non-contact visits and phone calls per the current schedule for other death row inmates in Browning or the Lumley Unit.

8.0 THIRTY-FIVE DAYS PRIOR TO THE DAY OF EXECUTION – CENTRAL OFFICE

8.1 The Assistant Director for Prison Operations:

8.1.1 Identifies and assigns team leaders and members, with documented approval by the Director, and upon approval shall activate the teams.

8.1.2 Confirms preventive maintenance in Housing Unit 9 occurs and that an equipment inventory is completed, and appropriate and timely action is taken.

8.1.3 Directs the initiation of the Continuous Observation Log commencing on the 35th day prior to the day of the execution. The log shall follow the inmate from ASPC-Eyman or ASPC-Perryville to Housing Unit 9 at ASPC-Florence and be maintained until the execution occurs or a stay of execution is issued.

8.1.4 Activates the training schedule ensuring staff participating in the execution receives adequate training, written instruction and practice, all of which is documented.

8.2 The Assistant Director for Medical Services

8.2.1 Directs ADC's Medical Services staff or ADC's contracted Medical Services provider to conduct a medical records file review to identify any prescribed medication(s) and dosages the inmate is currently or was recently taking. ADC's Medical Services staff or ADC's contracted Medical Services provider shall modify prescribed medications as may be necessary.

8.2.2 Directs ADC's Medical Services staff or ADC's contracted Medical Services provider to dispense all inmate medications in unit doses and, when available in liquid form. No medication including over-the-counter medications shall be provided or maintained by the inmate as Keep-on-Person.

8.2.3 Ensures ADC's Medical Services staff or ADC's contracted Medical Services provider continuously monitors for significant changes in the inmate's medical or mental health and reports findings immediately to the Department's General Counsel.

8.3 The Media Relations Office:

8.3.1 Issues a news advisory announcing the date of the execution.

8.3.2 Facilitates up to one non-contact interview with the inmate by phone, per day, with media from the day the Warrant is issued until the day before the sentence of death is imposed excluding weekends and state and federal holidays. The inmate and Attorney of Record may select among these requests that are submitted to the Media Relations Office and recommend the order in which they occur. The inmate may refuse any or all media requests for interviews.

8.4 The Office of Victim Services – Identifies and advises victims of the crime for which the inmate has been sentenced to death of the issuance of the Warrant of Execution and the scheduled date and time of the execution.

9.0 TWENTY-ONE DAYS PRIOR TO THE DAY OF EXECUTION – CENTRAL OFFICE

9.1 The Media Relations Office:

9.1.1 Forwards media-witness applications to the Inspector General for background investigation. The Inspector General shall advise the Director of any issues arising from such investigations.

9.1.2 Sends media-witness agreement forms (Official Witness Agreement, Form 710-6, and as applicable, Official Witness/Pool Reporter Agreement, Form 710-7) to identified media-witnesses, and establishes a deadline for the return of all such forms.

9.1.3 All witnesses shall sign and timely submit an Official Witness Agreement, Form 710-6, prior to being cleared and added to the witness list.

9.1.3.1 All official witnesses who are also members of media/press and are selected to serve as pool reporters shall also sign and timely return the Official Witness/Pool Reporter Agreement, Form 710-7.

10.0 FOURTEEN DAYS PRIOR TO THE DAY OF EXECUTION – CENTRAL OFFICE

10.1 The Inspector General or designee:

10.1.1 Finalizes arrangements with a Medical Examiner Office for the disposition of the body, security for the Medical Examiner's vehicle and the custodial transfer of the body.

10.1.2 Obtain a body bag and tag from the Medical Examiner's Office.

10.2 General Counsel:

10.2.1 Finalizes a list of all witnesses including official, victim, inmate witnesses and media/pool reporters, through coordination with the Offices of Victim Services and Media Relations, for the Director's review and documented approval.

10.2.1.1 Upon documented approval the Director or designee shall prepare a written invitation to each chosen witness. (See Attachment A.)

10.3 The Media Relations Office – Issue a news advisory announcing the date and time of the execution.

11.0 TWO DAYS PRIOR TO THE DAY OF EXECUTION

11.1 The Assistant Director for Prison Operations:

11.1.1 Schedules and conducts on-site scenario training sessions, modifying practices as warranted.

11.1.2 Confirms adequate staffing and vehicles are in place for regular operations and the execution.

11.2 The ASPC-Florence Warden:

11.2.1 Confirms staff assigned to the Maintenance Response Team (MRT) is scheduled and will be on-site eight hours prior to the time scheduled for the imposition of sentence.

11.2.2 Restricts access to Housing Unit 9 to those with expressly assigned duties.

11.2.3 Readies Housing Unit 9 for the transfer of the inmate.

11.2.4 Verifies execution inventory, including the chemicals to be used, and equipment checks are completed and open issues resolved.

12.0 TWENTY-FOUR HOURS PRIOR TO THE DAY OF EXECUTION

- 12.1 On-site scenario exercises continue.
- 12.2 Final preparation of Housing Unit 9 is completed. Each room receives final evaluation specific to its functions including security, climate control, lighting, sound, sanitation, and that separation screens and appropriate restraints are at the ready.
- 12.3 Detailed staff briefings are provided.
- 12.4 The ASPC-Eyman or ASPC-Perryville Warden shall ensure the inmate receives the last meal by 1900 hours. Every reasonable effort to accommodate the last meal request will have been made. All eating utensils and remaining food and beverage shall be removed upon completion of the meal.
- 12.5 The ASPC-Eyman or ASPC-Perryville Warden shall ensure non-contact visits and phone calls are concluded by 2100 hours.
 - 12.5.1 The inmate's telephone privileges shall be terminated at 2100 hours the day prior to the execution, excluding calls from the inmate's Attorney of Record and others as approved by the Assistant Director for Prison Operations.
 - 12.5.2 The inmate's visitation privileges shall be terminated at 2100 hours the day prior to the execution. The inmate will be permitted two hours of in-person visitation with no more than two Attorneys of Record, concluding one hour prior to the scheduled execution.
- 12.6 The inmate is prepared for transfer to Housing Unit 9 by the prescribed means.

13.0 TWELVE HOURS PRIOR TO AND THROUGH THE EXECUTION

- 13.1 Restricting Access to Institution Property – During the final twelve hours prior to the execution, access to ASPC-Eyman or ASPC-Perryville and ASPC-Florence is limited to:
 - 13.1.1 On-duty personnel.
 - 13.1.2 On-duty contract workers.
 - 13.1.3 Volunteers deemed necessary by the Wardens.
 - 13.1.4 Approved delivery vehicles.
 - 13.1.5 Law enforcement personnel on business-related matters.
 - 13.1.6 Restrictions to these facilities shall remain in effect until normal operations resume after the execution or a stay of execution is issued.
- 13.2 Transfer of the inmate from Browning or Lumley Unit to Housing Unit 9
 - 13.2.1 The inmate shall be secured and transferred by the Execution Restraint Team per the prescribed means the night before the execution.
 - 13.2.2 Housing Unit 9 staff shall take custody of the inmate and the Observation Log. Staff shall assume maintenance of the log until the execution is completed or a stay of execution is issued.

- 13.2.3 Upon the inmate's arrival, the inmate may be offered a mild sedative.
- 13.2.4 No later than five hours prior to the execution, the inmate shall be offered a light meal. All eating utensils and remaining food shall be removed upon completion of the meal.
- 13.2.5 No later than four hours prior to the execution, the inmate may be offered a mild sedative.
- 13.2.6 These time frames may be adjusted as necessary in the event of a stay of execution or other exigencies.

13.3 Housing Unit 9 Conditions of Confinement

- 13.3.1 The inmate shall remain on Continuous Watch. Staff shall record observations and make entries in the Observation Record during the final four hours in hours, and minutes.
- 13.3.2 The inmate shall be issued one pair each of pants, boxer shorts and socks, and a shirt on the morning of the execution.
- 13.3.3 The cell shall be furnished with a mattress, pillow and pillowcase, one each top and bottom sheet, a blanket, a washcloth and towel, and toilet paper.
- 13.3.4 The inmate may have a pencil and paper, religious items, a book or periodical and indigent-sized hygiene supplies (liquid soap, toothpaste) and a toothbrush and comb. These items may be made available only for the duration of the use and shall be removed immediately thereafter. Any other requested property shall require approval by the Assistant Director for Prison Operations, and shall be documented.

13.4 Population Management – ASPC-Eyman or ASPC-Perryville and ASPC-Florence shall go on lockdown status from between two to six hours prior to the time the execution is scheduled to occur at the direction of Command. They shall remain on lock down throughout the execution. After the conclusion of the execution, the prisons shall return to regular operations at the direction of Command.

13.5 Additional Operations Requirements

- 13.5.1 Witness Escort Teams shall process, transport and remain with pre-approved official witnesses, inmate witnesses, media witnesses and victim(s) witnesses through the conclusion of the execution and their return to designated staging areas per prescribed means.
 - 13.5.1.1 Teams shall ensure each witness group is separated from the other witness groups at all times.
 - 13.5.1.2 The Director or designee shall provide a brief overview of the execution for the official witnesses. The Director shall advise witnesses that the curtains in the execution chamber may be drawn prior to the conclusion of the execution in the event of a legitimate penological objective which would merit such closure and then reopened when the execution resumes, and that an IV Team member will enter into the chamber and physically manipulate the inmate to check consciousness.

- 13.5.1.3 In the event the inmate has designated one of his attorneys to witness the execution, temporary office space will be provided for the inmate's counsel in the Administration Building during the scheduled day of execution. One attorney and two additional members of the legal team may be permitted to remain in the office space during the execution. The inmate's legal team will be permitted to bring into the temporary office space one mobile phone, one tablet, and one laptop. While the attorney witness is in the witness room, a member of the Witness Escort Team shall hold one mobile phone designated by the attorney, to be made available to the attorney in exigent circumstances. The mobile phone may not be used inside the witness room.
- 13.5.2 Upon the direction of the Director to proceed:
 - 13.5.2.1 The APSC-Florence Warden shall direct the Execution Restraint Team to prepare the inmate for escort into the execution chamber.
 - 13.5.2.2 Prior to moving the inmate from the holding cell to the execution table, the Director shall confer with the Attorney General or designee and the Governor or designee to confirm there is no legal impediment to proceeding with the lawful execution.
 - 13.5.2.3 When the inmate is secured on the execution table by the team and readied by qualified medical personnel, the Warden shall advise the Director.
 - 13.5.2.4 The Director shall reconfirm with the Attorney General or designee and the Governor or designee that there is no legal impediment to proceeding. Upon oral confirmation that there is no legal impediment to proceeding with the execution, the Director may order the Warden to proceed with the execution.
 - 13.5.2.4.1 If there is a legal impediment the Director shall instruct the ASPC-Florence Warden to stop, and to notify the inmate and witnesses that the execution has been stayed or delayed. The Warden shall also notify Command to notify the Media Relations staff who shall advise the media in the Press Room.
 - 13.5.2.5 The Warden shall read aloud a summary of the Warrant of Execution. The Warden shall ask the inmate if he wishes to make a last statement. The microphone will remain on during the last statement. It will be turned off in the event the inmate uses vulgarity or makes intentionally offensive statements. If the microphone is turned off, it will be turned back on immediately after the completion of the last statement.
 - 13.5.2.6 The Director shall instruct the disbursement of chemicals to begin by the prescribed means.
- 13.5.3 Pronouncement and Documentation of Death
 - 13.5.3.1 The Director shall announce death when it has occurred.

13.5.3.2 The ASPC-Florence Warden shall complete and sign the return of the Death Warrant pursuant to A.R.S. §13-759. The Director shall file the document with the sentencing court and the Arizona Supreme Court within 48 hours.

13.5.3.3 A Medical Examiner shall take custody of the body and issue a Certificate of Death.

13.6 Stay of Execution – Upon receipt of notification that the court has issued a Stay of Execution; the Director shall consult with the Attorney General’s Office and advise Command.

13.6.1 Upon receipt of notification, the Housing Unit 9 Section Leader shall:

13.6.1.1 Advise the witnesses a Stay of Execution has been issued.

13.6.1.2 Following consultation with the Director, direct that the catheters be removed, if applicable, and direct the Restraint Team to return the inmate to the holding cell.

13.6.1.3 Instruct the Special Operations to stand down.

13.6.2 Command shall inform the following teams of the Stay of Execution:

13.6.2.1 Traffic Control Team Leader

13.6.2.2 Population Assessment

13.6.2.3 Critical Incident Response Team Leader

13.6.2.4 Media Relations Director

13.6.2.5 Victim Services Team Leader

13.6.2.6 Escort Team leader

13.6.3 The Traffic Control Team Leader shall notify protestors of the issuance of the Stay of Execution.

13.6.4 The Escort Team shall commence escorting witness groups from Housing Unit 9 as set forth herein.

13.6.5 Upon Command’s instruction, the inmate shall be transported from Housing Unit 9 back to Death Row at Browning or Lumley Unit and their personal possessions returned. Following the transport, the inmate will be permitted to consult with the inmate’s attorney(s) upon request.

14.0 POST-EXECUTION

14.1 Removing Witnesses from Housing Unit 9

14.1.1 After the pronouncement of death, witnesses shall be escorted in the prescribed order from the facility.

- 14.1.1.1 Each group of witnesses will continue to be kept separated from the other groups at all times.
 - 14.1.1.2 Official witnesses who are media pool reporters will return to the Press Room to participate in the media briefing.
 - 14.1.1.3 Victim witnesses speaking with the media will be escorted to the Press Room.
- 14.1.2 Media may remain on site in a designated location outside the secure perimeter for a limited time to complete live broadcasts.
- 14.2 Site Clean Up
 - 14.2.1 Under the supervision of a person designated by the ASPC-Florence Warden, Housing Unit 9 shall be cleaned and secured.
 - 14.2.2 Institutional staff trained in infectious diseases preventive practices will utilize appropriate precautions in cleaning Housing Unit 9.
- 14.3 Normal Operations
 - 14.3.1 Command shall determine when the prisons resume normal operations after receiving assessments from the Wardens of ASPC-Florence and ASPC-Eyman or ASPC-Perryville.
 - 14.3.2 Department personnel shall be deactivated at the direction of Command.
- 14.4 Execution Documentation
 - 14.4.1 The ASPC-Florence Warden shall be responsible to gather all documents pertaining to the execution and forward to the Department's General Counsel for archive.
 - 14.4.2 Pursuant to A.R.S. §13-759 (B), the Director shall send written notification to the sentencing court and the Arizona Supreme Court stating the time, mode and manner in which the Warrant was carried out. (See Attachments B and C.)

15.0 PROCEDURES FOR NEWS MEDIA

- 15.1 Reasonable efforts will be made to accommodate representatives of the news media before, during and after a scheduled execution however; the Department reserves the right to regulate media access to ensure the orderly and safe operations of its prisons.
- 15.2 The Media Relations Office shall coordinate the release of information to news media outlets. All Department and contract staff are expressly prohibited from providing information not readily available in the public domain.
- 15.3 Update Prior to the Execution – Following activation of the Press Room, the Media Relations Director and the Public Information Officer shall provide the news media with regular briefings or updates.
- 15.4 Media Orientation and Releases – The Media Relations Director shall provide general information regarding the execution and about the inmate.

15.4.1 Media Representatives will be informed how the press pool will be established and advised that if they are selected as press pool witnesses, they shall be required to complete and sign Media Witness Press Pool Agreement, Form 710-7, in addition the Official Witness Agreement, Form 710-6, prior to the execution.

15.4.2 Media Representatives will return to the Press Room after the execution to answer questions of all other media representatives concerning their observations during the execution, prior to filing or reporting their story.

15.5 Press Room Operations

15.5.1 Media representatives requesting to witness an execution must submit written requests to the Media Relations Office no later than 28 days prior to the execution. Each request must include the name, social security number and birth date of media requesting access. Only those news organizations that have submitted written requests within the stated time frame shall be considered.

15.5.2 The Media Relations Office shall finalize recommendations for selected media to perform official witness/pool reporter functions 14 days prior to the execution.

15.6 Briefing Packets and Updates

15.6.1 The Media Relations Office shall provide press briefing packets for reporters.

15.6.2 A brief summary of inmate's activities during the final twenty-four hours, activities related to the execution and sequence of events, may be provided.

15.7 News Media Selection

15.7.1 No more than five members of the Arizona media may be selected to witness the execution as official witnesses. Selected media will perform the additional duties of pool reporter:

15.7.1.1 Print

15.7.1.2 Radio

15.7.1.3 Television/Cable

15.7.1.4 Local media representative in the market where the crime was committed

15.7.2 Media is held to the same standards for conduct as are all other official witnesses.

15.7.3 Command may exclude any media witness at any time if the media witness fails to abide by the provisions of the Official Witness and Pool Reporter Agreements (Forms 710-6 and 710-7).

15.7.4 Media witnesses are not permitted to bring unauthorized items into Housing Unit 9. Unauthorized items include:

15.7.4.1 Electronic or mechanical recording devices

15.7.4.2 Still, moving picture or video tape camera

15.7.4.3 Tape recorders or similar devices

15.7.4.4 Radio/television broadcasting devices

15.7.5 Each pool reporter shall be provided a tablet of paper and a pencil to take notes from the time they complete security screening and board the bus until they are returned to the Press Room after the conclusion of the execution.

15.7.6 Official witnesses who are pool reporters shall attend a pre-execution briefing.

IMPLEMENTATION

The ASPC-Florence and ASPC-Perryville Wardens shall maintain Post Order #015, Death Watch Security Officer, delineating post-specific responsibilities. The ASPC-Florence Warden shall also maintain Post Order #015-A01, Housing Unit-9 Security Watch.

ATTACHMENTS *[Revision – March 10, 2021]*

Attachment A - Letter of Invitation to Witness an Execution
Attachment B - Return of Warrant Notification - Supreme Court
Attachment C - Return of Warrant Notification - Superior Court
Attachment D - Preparation and Administration of Chemicals
Attachment E – Lethal Gas

FORMS LIST

710-1, Method of Execution
710-2, Inmate Witness Information
710-3, Disposition of Remains
710-4, Authorized Witnesses for Execution Log (A, B and C)
710-5, Last Meal Request
710-6, Official Witness Agreement
710-7, Official Witness/Pool Reporter Agreement
710-8, Notice of Execution Involvement

AUTHORITY

A.R.S. §1-215 (28), Definitions
A.R.S. §13-105 (30), Definitions
A.R.S. §13-757 (B), Methods of Infliction of Sentence of Death
A.R.S. §13-757 (C), Identity of Executioners
A.R.S. §13-758, Persons Present at Execution of Sentence of Death; Limitations
A.R.S. §13-759 (B), Return Upon Death Warrant
A.R.S. §13-4021 through 13-4026, Insanity or Pregnancy of Persons under Death Sentence
Arizona Rules of Criminal Procedure, Rule 31.17(c)(3), Date and Time of Execution; Notification to Supreme Court

ATTACHMENT A

SAMPLE - LETTER OF INVITATION TO WITNESS AN EXECUTION

Date

Name

Mailing address

Mailing address

Dear _____

Thank you for expressing interest in serving as a witness.

Please be advised that you are selected to witness the execution of _____
[name] _____ [number], on _____ [date] at _____ [time] subject to the conditions stipulated
in this correspondence.

There are three kinds of witnesses. They are 1) Official Witnesses including Official Witnesses who are members of the media and will serve as Pool Reporters, 2) the Inmate's Witnesses and 3) the Victim(s) Witnesses.

All witnesses are required to complete the *Witness Agreement* form and return it to the Media Relations Office of the Arizona Department of Corrections, Rehabilitation and Reentry no later than _____
[date] by fax, mail, hand delivery or as an e-mail attachment.

Official Witnesses who are members of the media and will be serving as Pool Reporters are also required to complete the *Official Witnesses/Pool Reporters Agreement* form. This form must be returned as well to the Media Relations Office of the Arizona Department of Corrections, Rehabilitation and Reentry no later than the Friday before the scheduled date of the execution, _____ [date] by the same means.

Failure to fully complete and return on time the required forms with receipt by the Department before 5 P.M. on _____ [date], will result in your removal from the list of approved witnesses.

For additional information and to confirm receipt of your materials, you are welcome to contact the Media Relations Office by phone at 602-542-3133, by fax at 602-542-2859 or e-mail at media@azcorrections.gov.

Sincerely,

Media Relation Director

Applicable Attachments:

___ *Witness Agreement* form

___ *Official Witnesses/Pool Reporters Agreement* form

ATTACHMENT B

SAMPLE - RETURN OF WARRANT NOTIFICATION

Supreme Court

DATE:

The Honorable
Chief Justice of the Supreme Court of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

RE: Return of Warrant of Execution

State vs.

Supreme Court Number:

County Number:

Chief Justice:

This is to advise you that in accordance with the Warrant of Execution, Supreme Court Number, and pursuant to A.R.S. §13-759(B), the imposition of the sentence of death of _____ was carried out at the Arizona State Prison Complex-Florence on _____, 21 _____, at _____ A.M./P.M.

The mode and manner of the death was by lethal _____.

Sincerely,

David Shinn
Director
Arizona Department of Corrections, Rehabilitation and Reentry

ATTACHMENT C

SAMPLE - RETURN OF WARRANT NOTIFICATION

Superior Court

DATE:

The Honorable
Presiding Judge
Superior Court of Arizona
In County
_____, Arizona

RE: Return of Warrant of Execution

State vs.

Supreme Court Number:

County Number:

Judge _____:

This is to advise you that in accordance with the Warrant of Execution, Supreme Court Number, and pursuant to A.R.S. §13-759(B), the imposition of the sentence of death of _____ was carried out at the Arizona State Prison Complex-Florence on _____, 21 _____, at _____ A.M./P.M.

The mode and manner of the death was by lethal _____.

Sincerely,

David Shinn
Director
Arizona Department of Corrections, Rehabilitation and Reentry

ATTACHMENT D**PREPARATION AND ADMINISTRATION OF CHEMICALS****A. Obtaining Chemicals and Equipment**

1. Upon receipt of the Warrant of Execution, the Housing Unit 9 Section Leader shall:
 - I. Confirm the equipment for the procedure and ensure all equipment necessary to properly conduct the procedure is on site, immediately available for use and functioning properly.
 - II. Ensure all medical equipment, including an ultrasound machine and a backup electrocardiograph is on site, immediately available for use and functioning properly.
 - III. Ensure that complete sets of chemicals are on site, not expired, and immediately available for use. ADC will only use chemicals in an execution that have an expiration or beyond-use date that is after the date that an execution is carried out. If the chemical's expiration or beyond-use date states only a month and year (e.g., "June 2017"), then ADC will not use that chemical after the last day of the month specified.
 - IV. Ensure the chemicals are ordered, arrive as scheduled and are properly stored. The chemicals shall be stored in a secured, locked area that is temperature regulated and monitored to ensure compliance with manufacturer specifications, under the direct control of the Housing Unit 9 Section Leader.

B. Preparation of Chemicals

1. Prior to the preparation of the chemicals, the Director or designee shall verify the chemicals to be used, the quantity and the expiration date.
2. At the appropriate time, the Housing Unit 9 Section Leader shall transfer custody of the chemicals to the Special Operations Team to begin the chemical(s) and syringe preparation in the chemical room, under the direct supervision by the IV Team Leader.
3. The Special Operations Team Leader will assign a team member(s) to assist preparing each chemical and the corresponding syringe. The IV Team Leader will supervise the process. The IV Team Leader, with the assistance of the Special Operations Team members, shall prepare the designated chemical(s) and syringes as follows:
 - One-drug protocol - One full set of syringes is used in the implementation of the death sentence (Bank "A") and an additional complete set of the necessary chemicals shall be obtained and kept available in the chemical room, but need not be drawn into syringes unless the primary dosages prove to be insufficient for successful completion of the execution.
4. The IV Team Leader, with the assistance of a Special Operations Team member, shall be responsible for preparing and labeling the assigned sterile syringes in a distinctive manner identifying the specific chemical contained in each syringe by i) assigned number, ii) chemical name, iii) chemical amount and iv) the designated color, as set forth in the chemical charts below. This information shall be preprinted on a label, with one label affixed to each syringe to ensure the label remains visible.

C. Chemical Charts; Choice of Protocol

- Charts for all chemical protocols follow. The Director shall have the sole discretion as to which drug protocol will be used for the scheduled execution. This decision will be provided to the inmate and their counsel of record in writing at the time the state files a request for Warrant of Execution in the Arizona Supreme Court. If the Department is able to obtain the chemical pentobarbital in sufficient quantity and quality to successfully implement the one-drug protocol with pentobarbital set forth in Chart A, then the Director shall use the one-drug protocol with pentobarbital set forth in Chart A as the drug protocol for execution. If the Department is unable to obtain such pentobarbital, but is able to obtain the chemical sodium pentothal in sufficient quantity and quality to successfully implement the one-drug protocol with sodium pentothal set forth in Chart B, then the Director shall use the one-drug protocol with sodium pentothal set forth in Chart B as the drug protocol for execution.
- A quantitative analysis of any compounded or non-compounded chemical to be used in the execution shall be provided upon request within ten calendar days after the state seeks a Warrant of Execution. The decision to use a compounded or non-compounded chemical will be provided to the inmate and their counsel of record in writing at the time the state files a request for Warrant of Execution in the Arizona Supreme Court.

CHART A: ONE-DRUG PROTOCOL WITH PENTOBARBITAL

CHEMICAL CHART	
Syringe No.	Label
1A	20mL Sterile Saline Solution, BLACK
2A	2.5gm Pentobarbital, GREEN
3A	2.5gm Pentobarbital, GREEN
4A	20mL Sterile Saline Solution, BLACK

- Syringes 2A, and 3A, will have a dose of 2.5 grams (gm) of Pentobarbital for a total of 5 grams. Each syringe containing Pentobarbital shall have a **GREEN** label which contains the name of chemical, chemical amount and the designated syringe number.
- Syringes 1A, and 4A, each contain 20 milliliters (mL) of a sterile saline solution, and shall have a **BLACK** label which contains the name of the chemical, chemical amount and the designated syringe number.

CHART B: ONE-DRUG PROTOCOL WITH SODIUM PENTOTHAL

Syringe No.	Label
1A	20mL Sterile Saline Solution, BLACK
2A	1.25gm Sodium Pentothal, GREEN
3A	1.25gm Sodium Pentothal, GREEN
4A	1.25gm Sodium Pentothal, GREEN
5A	1.25gm Sodium Pentothal, GREEN
6A	20mL Sterile Saline Solution, BLACK

- Syringes 2A, 3A, 4A, 5A, each contain 1.25gm/50mL of Sodium Pentothal / 1 in 50mL of sterile water in four 60mL syringes for a total dose of 5 grams of Sodium Pentothal. Each syringe containing Sodium Pentothal shall have a **GREEN** label which contains the name of chemical, chemical amount and the designated syringe number.
 - Syringes 1A, and 6A, each contain 20mL of a sterile saline solution, and shall have a **BLACK** label which contains the name of the chemical, chemical amount and the designated syringe number.
3. After the IV Team prepares all required syringes with the proper chemicals and labels as provided in the Chemical Chart, the Special Operations Team, under the supervision of the IV Team, shall attach one complete set of the prepared and labeled syringes to the 2-Gang, 2-Way Manifold in the order in which the chemical(s) are to be administered. The syringes will be attached to the 2-Gang, 2-Way Manifold in a manner to ensure there is no crowding, with each syringe resting in its corresponding place in the shadow board which is labeled with the name of the chemical, color, chemical amount and the designated syringe number.
 4. The syringes shall be affixed in such a manner to ensure the syringe labels are clearly visible. Prior to attaching the syringes to the 2-Gang, 2-Way Manifold, the flow of each gauge on the manifold shall be checked by the IV Team Leader running the sterile saline solution through the line to confirm there is no obstruction.
 5. After all syringes are prepared and affixed to the 2-Gang, 2-Way Manifold in proper order, the Special Operations Team Leader shall confirm that all syringes are properly labeled and attached to the manifold in the order in which the chemicals are to be administered as designated by the Chemical Chart. Each chemical shall be administered in the predetermined order in which the syringes are affixed to the manifold.
 6. The quantities and types of chemicals prepared and administered as set forth in this Department Order may not be changed in any manner without prior documented approval of the Director and publication of an amended Department Order. The Director's discretion with regard to the quantities and types of chemicals is otherwise limited to what is expressly set forth in this Department Order. If, after a Warrant of Execution has been issued, the Director determines that it is necessary to change the quantities or types of chemicals to be used in the impending execution, then the Director shall immediately notify the inmate and the inmate's counsel in writing, shall withdraw the existing Warrant of Execution, and shall apply for a new Warrant of Execution.
 7. All prepared chemicals shall be utilized or properly disposed of in a timely manner after the time designated for the execution to occur.
 8. The chemical amounts as set forth in the Chemical Chart are designated for the execution of persons weighing 500 pounds or less. The chemical amounts will be reviewed and may be revised as necessary for an inmate exceeding this body weight.
 9. The Special Operations Team Recorder is responsible for completing the Correctional Service Log, Form 105-6. The Recorder shall document on the form the amount of each chemical administered and confirm that it was administered in the order set forth in the Chemical Chart. Any deviation from the written procedure shall be noted and explained on the form.

D. Movement and Monitoring of Inmate

1. Prior to moving the inmate from the holding cell to the execution table, the Director will confer with the Attorney General or designee and the Governor or designee to confirm there is no legal impediment to proceeding with the lawful execution and there are no motions pending before a court which may stay further proceedings.

2. The inmate may be offered a mild sedative based on the inmate's need. The sedative shall be provided to the inmate no later than four hours prior to the execution, unless it is determined medically necessary. The offer of the mild sedative, the inmate's decision, and the administration of the sedative, if chosen, shall be documented in the watch log.
3. At the designated time, the overhead microphone will be turned on, and shall be left on until the completion of the execution, and the inmate will be brought into the execution room and secured on the table by the prescribed means with the inmate's arms positioned at an angle away from the inmate's side. Existing closed-circuit monitors will allow witnesses in the designated witness room to observe this process.
4. The inmate will be positioned to enable the IV Team or the Special Operations Team Leader and the Warden to directly observe the inmate and to monitor the inmate's face with the aid of a high resolution color camera and a high resolution color monitor.
5. After the inmate has been secured to the execution table, the Restraint Team Leader shall personally check the restraints which secure the inmate to the table to ensure they are not so restrictive as to impede the inmate's circulation, yet sufficient to prevent the inmate from manipulating the catheter and IV lines.
6. A microphone will be affixed to the inmate's shirt, and shall be left on until the completion of the execution, to enable the persons in the witness room and the IV Team or the Special Operations Team Leader to hear any utterances or noises made by the inmate throughout the procedure. The Special Operations Team Leader will confirm the microphone is functioning properly, and that the inmate can be heard in the chemical room and in the witness room.
7. The Restraint Team members will attach the leads from the electrocardiograph to the inmate's chest once the inmate is secured. The IV Team Leader shall confirm that the electrocardiograph is functioning properly and that the proper graph paper is used. A backup electrocardiograph shall be on site and readily available if necessary. Prior to the day of, and on the day of the execution both electrocardiograph instruments shall be checked to confirm they are functioning properly.
8. An IV Team member shall be assigned to monitor the EKG, and mark the EKG graph paper at the commencement and completion of the administration of the lethal chemical(s).
9. Throughout the procedure, the IV Team Leader shall monitor the inmate's level of consciousness and electrocardiograph readings utilizing direct observation, audio equipment, camera and monitor as well as any other medically approved method(s) deemed necessary by the IV Team Leader. The IV Team Leader shall be responsible for monitoring the inmate's level of consciousness.
10. Existing closed-circuit monitors will allow witnesses in the designated witness room to observe the IV Team's vein assessment and placement of IV catheters in the inmate. In addition, the audio feed from the overhead microphone and from the microphone affixed to the inmate's shirt shall remain on until the completion of the execution.
11. A camera will be focused on the area in the chemical room in which syringes are injected into the IV line, and existing closed-circuit monitors will allow witnesses in the designated witness room to observe the administration of the lethal injection drug(s), including the administration of additional or subsequent doses of the drug(s). All cameras and monitors shall be placed in such a manner so as to ensure and preserve at all times the anonymity of all personnel involved in the execution process.

E. Intravenous Lines

1. The Director acting upon the advice of the IV Team Leader shall determine the catheter sites. A femoral central line shall only be used if the person inserting the line is currently qualified by experience, training, certification or licensure within the United States to insert a femoral central line. The IV Team members shall insert a primary IV catheter and a backup IV catheter.
2. The IV Team Leader shall ensure the catheters are properly secured and properly connected to the IV lines and out of reach of the inmate's hands. A flow of sterile saline solution shall be started in each line and administered at a slow rate to keep the lines open.
3. The primary IV catheter will be used to administer the lethal chemical(s) and the backup catheter will be reserved in the event of the failure of the first line. Any failure of a venous access line shall be immediately reported to the Director.
4. The IV catheter in use shall remain visible to the Warden throughout the procedure.
5. The Warden shall physically remain in the room with the inmate throughout the administration of the lethal chemical(s) in a position sufficient to clearly observe the inmate and the primary and backup IV sites for any potential problems and shall immediately notify the IV Team Leader and Director should any issue occur. Upon receipt of such notification, the Director may stop the proceedings and take all steps necessary in consultation with the IV Team Leader prior to proceeding further with the execution.
6. Should the use of the backup IV catheter be determined to be necessary, a set of backup chemicals should be administered in the backup IV.

F. Administration of Chemicals – One-Drug Protocol

1. At the time the execution is to commence and prior to administering the lethal chemical, the Director will reconfirm with the Attorney General or designee and the Governor or designee that there is no legal impediment to proceeding with the execution. Upon receipt of oral confirmation that there is no legal impediment, the Director will order the administration of the chemical to begin.
2. Upon receipt of the Director's order and under observation of the IV Team Leader, the Special Operations Team Leader will instruct the assigned Special Operations Team member(s) to begin dispensing the chemicals under the chosen drug protocol.
3. Upon direction from the Special Operations Team Leader, the assigned Special Operations Team member will visually and orally confirm the chemical name on the syringe and then administer the first syringe of the sterile saline solution, followed by the full dose of the lethal chemical immediately followed by the sterile saline solution flush.
4. When three minutes has elapsed since commencing the administration of the lethal chemical, the IV Team Leader, dressed in a manner to preserve their anonymity, will enter into the room where the Warden and inmate are located to physically confirm the inmate is unconscious by using all necessary medically appropriate methods, and verbally advise the Director of the same. The IV Team Leader will also confirm that the IV line remains affixed and functioning properly.
5. If, after three minutes, the inmate remains conscious, the IV Team shall communicate this information to the Director, along with all IV Team input. The Director will determine how to proceed or, if necessary, to start the procedure over at a later time or stand down. The Director may direct the curtains to the witness viewing room be closed, and, if necessary, for witnesses to be removed from the facility, only in the event of a legitimate penological objective which would merit such closure and/or removal.

6. If deemed appropriate, the Director may instruct the Special Operations Team to administer an additional dose of the lethal chemical followed by the sterile saline solution flush. This may be administered via the primary or backup IV catheter, as determined following consultation with the IV Team.
7. Upon administering the lethal chemical and sterile saline solution from a backup set, the IV Team shall determine whether the inmate is unconscious by sight and sound, utilizing the audio equipment, camera and monitor. The IV Team Leader will again physically determine whether the inmate is unconscious using proper medical procedures and verbally advise the Director of the same.
8. When all electrical activity of the heart has ceased as shown by the electrocardiograph, the IV Team Leader will confirm the inmate is deceased and the inmate's death shall be announced by the Director.
9. The Special Operations Team Recorder shall document on the Correctional Services Log the start and end times of the administration of the lethal chemical.
10. Throughout the entire procedure, the IV Team members, the Special Operations Team members and the Warden shall continually monitor the inmate using all available means to ensure that the inmate remains unconscious and that there are no complications.

G. Contingency Procedure

1. An Automated External Defibrillator (AED) will be readily available on site in the event that the inmate goes into cardiac arrest at any time prior to dispensing the chemicals; trained medical staff shall make every effort to revive the inmate should this occur.
2. Trained medical personnel and emergency transportation, neither of which is involved in the execution process, shall be available in proximity to respond to the inmate should any medical emergency arise at any time before the order to proceed with the execution is issued by the Director.
3. If at any point any team member determines that any part of the execution process is not going according to procedure, they shall advise the IV Team Leader who shall immediately notify the Director. The Director may consult with persons deemed appropriate and will determine to go forward with the procedure, limited to the option provided in Attachment D, §F(6), or to stand down. If the Director determines to stand down, then trained medical staff shall make every reasonable effort to revive the inmate.
4. There shall be no deviation from the procedures as set forth herein, except as expressly allowed herein. There shall be no deviation from the procedures as set forth herein without prior consent from the Director. Although such consent may be verbal or in writing, the Director must memorialize and maintain a written record of having granted any deviations, which record must include a detailed description of the deviation, the basis for the deviation, and the basis for the Director's consent thereto.

H. Post Execution Procedures

1. Upon the pronouncement of death, the Director shall notify the Governor or designee and the Attorney General or designee via telephone that the sentence has been carried out and the time that death occurred.
2. An IV Team member will clamp and cut the IV lines leaving them connected to the inmate for examination by a Medical Examiner.

3. A Criminal Investigations Unit Investigator and a Medical Examiner will take photos of the inmate's body:
 - While in restraints prior to being placed in the body bag,
 - Without restraints prior to being placed in the body bag,
 - Sealed in the body bag, and
 - A photo of the seal in place on the bag.
4. The inmate's body will be placed on a Medical Examiner's gurney and released into the custody of a Medical Examiner's Office.
5. Once the inmate's body is placed in a Medical Examiner's transport vehicle, it will be escorted off the premises. The Examiner's Office will take the inmate's body to the medical examiner's office designated by the county.

I. Documentation of Chemicals and Stay

1. In the event that a pending stay results in more than a two hour delay, the catheters shall be removed, if applicable, and the inmate shall be returned to the holding cell until further notice.
2. The Correctional Service Logs the list of identifiers and the EKG tape shall be submitted to the Department's General Counsel for review and storage.

J. Debrief and Policy Review

1. The IV and Special Operations Teams will participate in an informal debriefing immediately upon completion of the event.
2. Upon an assignment to a Team, team members shall review Department Order #710, Execution Procedures.
3. Periodically, and in the discretion of the Director, a review of Department Order #710, Execution Procedures along with this attachment may be reviewed to confirm it remains consistent with the law. General Counsel shall advise the Director immediately upon any change that may impact these procedures.

ATTACHMENT E*[Revision – March 10, 2021]***LETHAL GAS**

1. Approximately 10 minutes before the execution, Chemical Operators #1 and #2 shall sequentially pour 6 QUARTS OF DISTILLED WATER and 5 PINTS OF SULPHURIC ACID into the mixing pot (9). THE WATER SHOULD BE POURED FIRST. UPON COMPLETION OF POURING THE WATER, 5 PINTS OF SULFURIC ACID SHOULD BE POURED NEXT. RUBBER GLOVES AND GLASS FUNNEL SHALL BE USED. THE ACID MUST BE POURED SLOWLY TO PREVENT SPLATTERING. This mixture should remain in the mixing pot (9) for approximately 10 minutes so as to attain an adequate mix and maximum temperature. Keep away from acid fumes and possible splatter caused by boiling. This mixture will yield a 41.5% concentration.
 - Chemical Operator #1 shall ensure that the mixture shall not pass to the chair receptacle until after the Chamber door is closed and instructions received from the Chamber Operator.
 - The Caustic Soda Neutralizing solution shall be prepared by Chemical Operator #2 immediately after the completion of the acid mixture.
 - Chemical Operator #2 shall put on rubber gloves and dissolve 1 pound of CAUSTIC SODA into 2½ gallons of water already in a pour-spout can. Once the mixing process is complete, this solution should be kept near the mixing on the floor in close proximity to the mixing pot (9).
 - Chemical Operator #2 shall dissolve 30 grains of Phenolptalein Solution in 4 ounces of alcohol. If the solution is pre-mixed, then skip this step.
 - Chemical Operator #2 shall relay to the Special Operations Team Leader that the chemical mixing process is complete.
 - The Housing Unit 9 Team Leader will notify the Director that the chemical mixing is complete and the chamber is ready.
 - The Director will instruct the Housing Unit 9 Team Leader to move the inmate to the chamber.
2. The inmate shall be brought into the execution room and placed in the Chamber and strapped in the chair by the Restraint Team. The internal Chamber microphone will be turned on and a microphone will be affixed to the inmate's shirt and also turned on; both microphones shall remain on until the completion of the execution (the microphones will remain on during any last statement by the inmate, but will be turned off in the event the inmate uses vulgarity or makes intentionally offensive statements; if the microphones are turned off, they will be turned back on immediately after the completion of the last statement) to enable the persons in the witness room and the Special Operations Team Leader to hear any utterances or noises made by the inmate throughout the procedure. The Special Operations Team Leader will confirm that the microphones are functioning properly and that the inmate can be heard in the operations room and in the witness room.

- a. Closed-circuit monitor(s) will allow witnesses in the designated witness room to observe this process and shall remain on until the completion of the execution. All cameras and monitors shall be placed in such a manner so as to ensure and preserve at all times the anonymity of all personnel involved in the execution process.
3. Chemical Operator #2 shall place 4 petri dishes containing the Phenolptalein Solution inside the chamber so as to be clearly visible to the Chamber Operator. (Location should be at each designated corner of the chamber.)
4. After the inmate is strapped in the chair, Chemical Operator #2 shall verify that the petri dishes containing Phenolphthalein are still in their proper place.
5. Chemical Operator #2 shall inspect the GAS VALVE LEVER (1) and GAS VALVE POT (10) to ensure that it is dry and in the Closed position. Once this is confirmed, Chemical Operator #2 shall place the sodium cyanide packets in the GAS VALVE POT (10) under the chair.
6. Chemical Operator #2 and the Chamber Operator shall close the Chamber door and ensure that it is properly sealed.
7. The Chamber Operator shall ensure that the fan damper is in the closed position. Once this is confirmed, the chamber fan shall be activated and left on.
 - The manometer H pressure gauge readings on the chamber shall be monitored to determine air tightness of Chamber.
 - The Chamber will be considered air-tight if the manometer gauge to the right has a higher reading than the left.
 - If the readings on both the manometer H gauges remain equal, the Chamber Operator shall notify the Housing Unit 9 Team Leader immediately.
8. The Chamber Operator shall position himself at the GAS VALVE LEVER (1).
9. The Chamber Operator shall ensure that the Outlet Valve (4) is closed. This Outlet Valve (4) shall remain closed until the chamber is cleared.
10. Chemical Operator #2 shall proceed back to the Chemical preparation room.
11. The Housing Unit 9 Team Leader shall notify the Director that the chamber is ready.
12. Chemical Operator #1 and the Chamber Operator shall release the mixed acid and water from the mixing pot (9) into the Gas Generator by opening the Acid Mixing Pot Valve (Red lever) and Inlet Valve (3). Chemical Operator #1 shall visually observe the liquid drain from the mixing pot. Once fully drained, Chemical Operator #1 shall close the Acid Mixing Pot Valve and place it in the Closed Position.
13. Chemical Operator #1 shall notify the Chamber Operator that the acid mixture is fully drained.
14. The Chamber Operator shall close the inlet valve (3) and advise the Chemical Operators when complete.

15. Chemical Operator #2 shall fill the mixing pot (9) with the Caustic Soda solution.
16. The Chamber Operator shall then advise the Housing Unit 9 Team Leader that the Chamber is ready for use.
17. The Housing Unit 9 Team Leader shall notify the Director that everything is ready to proceed. The Director shall make the final notifications to the Attorney General.
18. The Director shall instruct the Chamber Operator to remove the locking pin of the GAS VALVE LEVER (1) (Sodium Cyanide immersion lever) and open the immersion valve, to drop the pellets into the acid in the gas generator. The Gas Valve Lever (1) shall remain open until the clearing process of chamber is initiated.
19. With the Chamber in operation, the Housing Unit 9 Team Leader and the Recorder will observe and record as necessary. A member of the medical team shall monitor the Inmate and EKG and shall advise the Director when the inmate has expired, providing the corresponding time of death.
20. The Director will announce that the execution has been completed. The Housing Unit 9 Team Leader will instruct the Operators to "Clear the Chamber".
 - NOTE: The length of time required should be determined by a member of the medical team and the Housing Unit 9 Team Leader. It is recommended that this period should be no less than 10 minutes.
21. When the Housing Unit 9 Team Leader announces "Clear the Chamber", the Chamber Operator shall move the exhaust fan damper lever (5) into the open position.
22. The Chamber Operator shall close the GAS VALVE LEVER (1) into the closed position for clearing.
23. Chemical Operator #1 and the Chamber Operator shall drain the Caustic Soda Solution into the gas generator. Chemical Operator #1 shall open the Acid Mixing Pot Valve (9). The Chamber Operator shall open the Inlet Valve (3) and allow caustic soda to fully drain into the gas generator.
24. Chemical Operator #1 shall monitor the CAUSTIC SODA SOLUTION until the Acid Mixing Pot is fully drained and empty.
25. Once the Acid Mixing Pot (9) is empty, Chemical Operator #1 shall close the mixing pot valve (Red Valve) and instruct the Chamber Operator to close the Inlet Valve (3).
26. The Chamber Operator shall inform the Chemical Operators once the Inlet Valve (3) is closed.
27. The Chemical Operator shall fill the mixing pot with water.
28. The Chamber Operator shall open the air manifold intake lever (2), which may be opened with graduated steps.
29. The Chamber Operator shall open the Outlet Valve (4), opening the gas generator drain valve first, and then opening the Inlet Valve (3).
30. Once the Inlet and Outlet Valves are fully open, the Chamber Operator shall inform the Chemical Operators to begin flushing.

31. The Chemical Operators shall open the water faucet, allowing additional water to flow into the mixing pot (9).
- The Chemical Operators shall observe the drainage of water from the mixing pot to ensure that the flushing is proceeding properly. During this period, the Chamber Operator shall perform the following functions:
 - a. The Chamber Operator and Chemical Operator #1 shall fully open the anhydrous ammonia tank valve, then open ammonia control valves (7) and (8) (on the regulators) gradually to reach the saturation to allow the effective neutralization of the residual chemicals in the chamber, gas generator and plumbing. After 30 seconds, both Operators shall close the ammonia tanks in the following sequence: The tank valves shall be closed first, and, after approximately 30 seconds, the regulator valves (7) and (8) shall be closed. This will allow the ammonia to drain from the piping. Anhydrous ammonia valves should be CLOSED OUT AT LEAST THREE MINUTES BEFORE OPENING THE CHAMBER DOOR.
 - b. After the Chamber is completely evacuated of gas and purged of the ammonia fumes, the phenolphthalein in the petri dishes should turn red (pinkish) in color. This color change is an indication that the Chamber door may be safely opened. A member of the medical team and Restraint Team now may enter, using masks for protection from any residual ammonia fumes. The Chamber Operator shall close the air valve lever (2).
 - CAUTION: Although smoke tests suggest that the Chamber is purged in approximately 3 to 5 minutes, it is recommended that the period between opening the exhaust and air inlet valves and opening the Chamber door be about 15 minutes. As a precautionary measure, it is recommended that the Physician and the Restraint Team removing the body wear hydrocyanic acid gas masks or approved respirators and rubber gloves and that the hair of the deceased inmate be ruffled in order to allow any residually trapped gas to escape. Close the Chamber door, but not tightened more than contact with the gasket, and aerate for one hour as necessary to clear any residual ammonia.
32. The Restraint Team shall hose down all the surfaces and the deceased inmate prior to removal from the chair.



DOUGLAS A. DUCEY
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DAVID SHINN
DIRECTOR

May 17, 2021

VIA EMAIL dale_baich@fd.org

Dale A. Baich, Esq.
Capital Habeas Unit Supervisor
Federal Public Defender's Office
850 West Adams Street, Suite 201
Phoenix, Arizona 85007

Re: Department Order 710

Dear Mr. Baich:

Your letter dated March 16, 2021 to Director Shinn has been forwarded to me for a response. You have requested further information about Department Order 710 and the execution process. For ease of reference, I will answer your questions in the same sequence in which you asked them.

As to "what provisions will be made for attorney-client contact", the provisions of DO 710, to which you cite, will be observed as with prior executions. There will be no "changes to ADC's approach" with regard to attorney "level of contact" with your clients.

As to "where will condemned prisoners be housed during the thirty-five day pre-execution period", the provisions of DO 710, to which you cite, will be observed as with prior executions. There will be no "new location" as you query.

As to "what process should [your] clients follow to designate a spiritual advisor...including remaining with them in the execution chamber", the provisions of DO 710, to which you cite, will be observed as with prior executions. As you acknowledge, the inmate is permitted to designate two clergy to provide spiritual counsel "leading up to their executions", and Form 710-2 provides for that designation. As long as the designated clergy pass a security background check, they will be allowed to so serve the inmate. If the inmate would like one of his designated clergy to personally minister to him during the execution process itself, then that one clergy will be allowed to remain in the witness room, outside the execution chamber, wearing a microphone with which to communicate with the inmate. To be clear, no physical contact with the inmate will be permitted at any time.

As to "what precautions will ADCRR implement to protect execution participants from contracting SARS-CoV-2", ADCRR will require all participants to comply with existing CDC and ADHS guidelines for correctional facilities, which are the same guidelines that ADCRR has been implementing across the prison

Dale A. Baich, Esq.

May 17, 2021

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system since last year: masks, social distancing, and frequent use of hand sanitizer as necessary. These requirements will apply to all in-person visits between attorneys and the inmate as well.

As to “what additional provisions exist for an execution by lethal gas”, the provisions of DO 710, to which you cite, will be observed as with prior executions. The “selection [and] composition” of the “lethal gas teams” has been determined as follows: the lethal gas team members are the same as the lethal injection team members; all have been cross-trained on both methods, as will be reflected upon production of the execution team training logs in response to your public records request set forth in your letter dated March 8, 2021.

As to your final request for confirmation that “the revised language in DO 710, § 1.1.2...is not intended to alter or eliminate the execution method choice provision found in A.R.S. § 13-757(B)”, that is hereby confirmed. In fact, on the next page of DO 710, in § 2.1.2.2, the statutory execution method choice for those designated inmates is expressly referenced, along with Form 710-1, upon which the inmate makes his choice.

If you have any further questions, please direct them to my attention and I will endeavor to respond as promptly as is reasonably possible.

Sincerely,

Brad K. Keogh

Brad K. Keogh
General Counsel

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June 16, 2021

VIA EMAIL (bkeogh@azadc.gov)

Brad K. Keogh
General Counsel
Arizona Department of Corrections,
Rehabilitation & Reentry
1601 W. Jefferson
Phoenix, AZ 85008

Re: Clarification of DO 710 (Amd. 3/10/2021)

Dear Mr. Keogh,

I am one Frank J. Atwood's attorneys and am writing today with respect to six requests for information or assistance. In the event that your responses to the four lattermost-queries take more time than your answer to my first two, I request that you prioritize your answers for my initial two questions and supply them once you have them.

In the event the Supreme Court of Arizona issues an execution warrant pursuant to its pending scheduling order in Mr. Atwood's case, the following enumerated queries seek clarification in relation to the above-referenced execution protocol of your department (*viz.*, the Department of Corrections, Rehabilitation & Reentry, hereinafter the "Department").

First, the Department's records reflect that Fr. Paisios of the St. Anthony's Greek Orthodox Monastery in Florence has regularly ministered to Mr. Atwood for many years via contact visits pursuant to court order, but this has been disrupted since February 2020 due to measures in response to the COVID-19 pandemic. It is anticipated that Fr. Paisios will resume visitation with Mr. Atwood in July. Section 7.0 of the above-referenced DO 710 (Amd. 3/10/2021) concerns "Thirty-Five Days Prior to the Day of Execution – Complex," and specifies, *inter alia*, the transfer of the prisoner under execution warrant to a "single person cell on Death Row Browning" § 7.1.5. Further, § 7.2.10 contemplates for such prisoners the availability of "non-contact visits . . . per the current schedule for other death row inmates in Browning" In the event an execution

[^] Admitted in Texas
[¥] Admitted in Texas and inactive in New York
[†] Admitted in Missouri and Pennsylvania
[‡] Admitted in Arizona, California and North Carolina
^{**} Admitted in New York
^{*} Admitted in Missouri

warrant is issued for Mr. Atwood, we request the Department to continue to provide Fr. Paisios contact visits with Mr. Atwood.

Second, we request information in the event Mr. Atwood is transferred to Housing Unit 9 pursuant to § 13.2 and/or, pursuant to § 13.5.2.1 – 13.5.2.6, the Execution Restraint Team escorts Mr. Atwood into the contemplated execution chamber—whether this is the lethal injection “execution chamber” or the gas “execution room,” which contains a “chair” inside a gas “Chamber.” *See* Attachment E (*infra*). If, in preparation for Mr. Atwood’s execution, the Team restrains him either, depending on the method, to the “execution table” or to the “chair,” we request the Department to permit Fr. Paisios access within the given execution chamber or execution room to remain by Mr. Atwood’s side to pray and administer last rites, including placing his hands on Mr. Atwood, if physically possible, as the execution is carried out. We request the Department to state in writing its position on this request.

Third, we request access on the earliest practicable date for Mr. Atwood’s legal team (including experts), to view the physical facility dedicated to conducting executions, referred to as Housing Unit 9 within ASPC-Florence. § 8.1.3, § 13.2. Specifically, this is the facility containing the execution chamber for the State’s lethal injection method and the execution room and Chamber for its lethal gas method. *Infra*.

Fourth, we request access to the single-person cell in the Browning Unit that presumably has been “retrofitted expressly for the purpose of holding” Mr. Atwood, as per § 7.1.5. As your Department is aware, Mr. Atwood is wheelchair-bound and otherwise suffers from a range of medical ailments. As reflected in his pending civil rights litigation concerning his conditions of confinement, Mr. Atwood has set forth numerous legal infirmities in your department’s confinement of him in the immediately recent past. *See Atwood v. Panahan Days, et al.*, CV 20-00623-PHX-JAT (JZB) (D. Ariz.). In the event Mr. Atwood is relocated pursuant to the issuance of an execution warrant and under § 7.1.5, we underscore the need for accommodations and equipment to ensure Mr. Atwood’s safety within the cell. This includes, but is not limited to, the appropriate placement of support rails.

Fifth, § 7.2.10 contemplates the provision of “outdoor exercise and showers, non-contact visits and phone calls per the current schedule for other death row inmates in Browning” Since circa October 1, 2020, Mr. Atwood has not had actual physical access to a shower during his confinement in the Browning Unit. (In contrast, between April 21 and June 4, 2021, while he was housed in the Central Unit’s infirmary—or intermittently hospitalized in connection with apparent kidney failure and near-fatal sepsis—he had access to the basic hygiene suitable for his disability.)

Mr. Brad K. Keogh, General Counsel
Jun. 16, 2021

3

We request an explanation of the plan for providing him regular access to a shower while confined in the above-mentioned single-person cell. Further, we request specificity as to how he will be afforded access to outdoor exercise given his physical relegation to a wheelchair.

Sixth, § 13.5.2 *et seq.* appears only to contemplate for the Execution Restraint Team the steps in escorting the condemned prisoner into the execution chamber dedicated for lethal injection executions. The relevant sub-sections use a definite article (“the”) in reference to “execution chamber” and only mention “the execution table” (§ 13.5.2.3). In contrast, Attachment E of the current version of DO 710 identifies “the execution room” and “the Chamber,” in relation to a Lethal Gas execution. Does the Department anticipate further amendment to clarify the Lethal Gas element of its current protocol?

In closing, thank you for your immediate attention to the foregoing. Please do not hesitate to contact me to clarify any of the above or otherwise to address these matters.

Very truly yours,



JOSEPH J. PERKOVICH

cc: Natman Schaye (by email, natman@azcapitalproject.org)
Sam Kooistra (by email, sam@azcapitalproject.org)



DOUGLAS A. DUCEY
GOVERNOR

Arizona Department of Corrections Rehabilitation & Reentry

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(602) 542-5497
www.azcorrections.gov



DAVID SHINN
DIRECTOR

June 30, 2021

VIA EMAIL j.perkovich@phillipsblack.org

Joseph J. Perkovich, Esq.
Phillips Black, Inc.
P.O. Box 4544
New York, New York 10163

Re: Department Order 710

Dear Mr. Perkovich:

I write in response to your letter dated June 16, 2021, wherein you request further information about Department Order 710 and the execution process. For ease of reference, I will answer your six questions in the same sequence in which you asked them.

As to your first and second inquiries about the role and access of clergy during the execution process, ADCRR answered these questions from the Federal Public Defender via correspondence dated May 17, 2021, a copy of which is attached hereto.

As to your third and fourth inquiries seeking an inspection of Housing Unit 9 and the single-person cell at the Browning Unit, ADCRR does not conduct pre-execution tours of these high-security areas. The single-person cell at the Browning Unit is ADA-compliant, which addresses what you characterize is "the need for accommodations and equipment to ensure Mr. Atwood's safety within the cell."

As to your fifth inquiry about "regular access to a shower [and]...to outdoor exercise", as you acknowledge, Department Order 710, § 7.2.10 provides for the continuance of "outdoor exercise and showers, non-contact visits and phone calls per the current schedule for other Death Row inmates in Browning...." Inmate Atwood therefore will receive these same privileges (which will include an ADA-compliant shower) that are provided to all other similarly situated Death Row inmates.

As to your sixth inquiry about whether ADCRR "anticipate[s] further amendment to clarify the Lethal Gas element of its current protocol", there is no need to "clarify" Department Order 710. Attachment D governs the lethal injection protocol and clearly and unambiguously provides in Paragraph D(3) that "the inmate will be brought into the execution room and secured on the table", which is consistent with § 13.5.2.1 and § 13.5.2.3, which likewise clearly and unambiguously respectively provide that the Execution Restraint Team will "prepare the inmate for escort into the execution chamber" and that the inmate "is secured on the

Joseph J. Perkovich, Esq.

June 30, 2021

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execution table.” Similarly, Attachment E governs the lethal gas protocol and clearly and unambiguously provides in Paragraph 2 that the inmate “shall be brought into the execution room and placed in the Chamber and strapped in the chair by the Restraint Team.”

If you have any further questions, please direct them to my attention and I will endeavor to respond as promptly as is reasonably possible.

Sincerely,

Brad K. Keogh

Brad K. Keogh
General Counsel

Enclosure



Inmate Informal Complaint Resolution

Complaints are limited to one page and one issue.

Please print all information.

INMATE NAME (Last, First M.I.) (Please print) Atwood, Frank J.	ADC NUMBER 062887	INSTITUTION/UNIT ASPC-E/Browning	DATE (mm/dd/yyyy) 01-02-2022
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TO CO III Monsibais	LOCATION George Cluster
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State briefly but completely the problem on which you desire assistance. Provide as many details as possible.

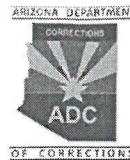
My spiritual advisor is Father Paisios of the St. Anthony's Greek Orthodox Monastery in Florence. My lawyers contacted ADCRR general counsel to ask whether, if I am executed under DO 710, Father Paisios would be permitted to be physically at my side during my execution. General Counsel replied that Father Paisios would be allowed in the witness room but would not be permitted not be permitted to be physically by my side during the execution. My religious beliefs require Father Paisios to stay by my side during my execution and to pray and administer last rites, including placing his hands on me and speaking to me. Preventing the clergy whom I designate to minister to me during my execution from having physical contact and speaking directly to me in administering my last rites unjustifiably interferes with the practice of my religion and violates my rights under the Free Exercise Clause of the First Amendment and substantially burdens the exercise of my religion in further violation of my rights under Federal law (e.g., Religious Land Use and Institutional Persons Act [RLUIPIA], et al.).

Proposed Resolution: I request the Department issue to me in writing that, as the Department conducts my execution under DO 710, the clergy whom I designate shall be permitted, in accordance with my religion in administering last rites, to be physically present with me, to sustain physical contact with me, and to speak with me.

INMATE SIGNATURE 	DATE (mm/dd/yyyy) 1/3/22
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Have you discussed this with institution staff? ☒ Yes ☐ No

If yes, give the staff member name: ADCRR General Counsel



Inmate Grievance/Informal Response Notice Non-Medical

Inmate Name: FRANK ATWOOD

Prison/Unit: EYMAN/EYMAN
BROWNING

ADC#: 62887

Bldg/Bed: A27 WG3G031B

Case #:22-035908

Informal Complaint

Type: Informal Response

Date Received: 01/04/2022 09:54 AM

Response Author: COIII MONSIBAIS

Responded On: 01/18/2022 09:11:37 AM

Decision:

Case Details

Case Number: 22-035908

Grievance Status: Open

Case Data

Prison of Complaint: EYMAN

Unit of Complaint: EYMAN BROWNING

Opened Date: 01/04/2022 09:54 AM

Grievance Stage: Informal Submitted

Grievance Category: Policy/Department Orders

Informal Grievance Response

Grievance Date: 01/02/2022 12:00:00 AM

Issue: Clergy present during execution

Response Due: 01/26/2022 09:54 AM

Responder: COIII MONSIBAIS

Response: This is in response to your informal complaint regarding your request to have your clergy at your side during execution in which you mention is necessary based on your religious beliefs. 710 – Execution Procedures 2.1.3.1.1 Inform the inmate that two clergy and five other persons may be invited to be present at the execution. Policy allows for clergy to be present as a witness during execution but does not give permission to allow clergy to be at your side during execution. Your request to have clergy at your side during execution cannot be resolved at my level.

☐ Unprocessed

Officer's Name: COIII MONSIBAIS

Notice: If you are dissatisfied with the Informal Complaint Response, you may file a formal grievance (form 802-1 Inmate Grievance, and/or form 802-7 GF Supplement) within five (5) workdays from receipt of the above response to the Grievance Coordinator by:

- Placing a single complaint on a single inmate Grievance form.

NOTE: If multiple unrelated issues are on a single form or if a duplicate complaint is filed, the grievance shall be rejected and returned unprocessed.



ARIZONA DEPARTMENT OF CORRECTIONS

Inmate Grievance

RECEIVED BY

TITLE

BADGE NUMBER

DATE (mm/dd/yyyy)

Note: You may appeal the Grievance Coordinator's decision to the Warden/Deputy Warden/Administrator by filing form 802-3, within 10 calendar days of receipt of this notice

INMATE NAME (Last, First M.I.) (Please print)

ADC NUMBER

DATE (mm/dd/yyyy)

INSTITUTION/FACILITY

CASE NUMBER

TO: GRIEVANCE COORDINATOR

Description of Grievance (To be completed by the Inmate)

As stated in the Informal Complaint Resolution, my religious needs require that during my execution, and at the time of my death, that I am able to speak directly with my priest and am able to have him lay hands on me. ADCRA Dept. Order 710 fails to provide these essential religious necessities and therefore violates my constitutional (1st Amendment) and congressional (RLUIPA) rights to freely exercise my religion.

Proposed Resolution (What informal attempts have been made to resolve the problem? What action(s) would resolve the problem?)

My attorney contacted the ADCRA General Counsel & I filed an Informal (attached) response for resolution attempts. To resolve, please grant that my spiritual advisor (Father Paisios) shall be physically present with me in the execution chamber during my execution for administering last rights by speaking directly to me and laying hands on me. Thank you!

INMATE'S SIGNATURE

DATE (mm/dd/yyyy)

GRIEVANCE COORDINATOR'S

DATE (mm/dd/yyyy)

Action taken by

Documentation of Resolution or Attempts at Resolution.

STAFF MEMBER'S SIGNATURE

BADGE NUMBER

DATE (mm/dd/yyyy)

ARIZONA DEPARTMENT OF CORRECTIONS,
REHABILITATION AND REENTRY
ARIZONA STATE PRISON COMPLEX
EYMAN / BROWNING UNIT

TO: ATWOOD, FRANK ADC # 062887 LOC: 3G31

FROM: R. Brier, Correctional Officer IV – Grievance Coordinator

Date: 02/04/2022

SUBJECT: Unprocessed Inmate Grievance #22-035908

The Inmate Grievance you submitted does not constitute a grievance. This is not a response to your Inmate Grievance. Your Inmate Grievance is being returned unprocessed because you failed to follow the grievance procedure per Policy as notated below:

- () You did not provide proof of submitting the Informal Resolution to your assigned COIII.
- () You did not submit the Informal Resolution 802-11 within 10 working days of the action that caused the complaint and no proof of your Informal complaint can be found within ACIS.
- () You are past time frames (5 working days) from the date you received your assigned COIII response to your informal for filing a grievance. Your due dates were between. You filed your grievance on.
- () You are past the time frames (5 working days) for filing an appeal. Your due dates were between. You filed your grievance on.
- () You failed to fill out your grievance form properly.
- () Used incorrect forms/have used the forms incorrectly.
- () The grievance is repetitive.
- () You did not provide original copies of documentation essential to the resolution (i.e. Inmate letter, COIII inmate letter response to informal resolution, property forms, store receipts, etc.).
- () Inmates shall, in writing, specify what attempts were made to resolve the complaint (i.e.: the names of any staff members contacted, how the inmate was harmed, the reasons why the complaint remains unresolved, what would resolve the complaint, etc.).
- () Your Grievance contained more than one complaint. Only one complaint per grievance is allowed.
- () You have been previously served with a letter that you have abused the Inmate Grievance System and that any future grievances will be assigned a number and returned with no answer and will not be subject to appeal.
- () You may only use the grievance process for the following issues: property, staff, visitation, mail, food service, institutional procedures, Department written Instructions, programs access, health care, religion and conditions of confinement.
- () Computation issues shall be addressed first by submitting an inmate letter to the inmate's assigned Institution Offender Information Unit.
- () Inmates may not use the inmate grievance system for classification, discipline issues, or any other system that has its own unique appeal process.
- (X) **Other: This is in the ARS codes. Your Inmate Grievance for this case was unprocessed due to judicial proceedings or decision of the courts. You cannot submit a Grievance Appeal.**
- () **Other:**

NOTE: All original time frames still apply. You must submit grievances per policy D.O. 802 (October 16, 2016).
For Grievance Appeal paperwork dated 1-19-2022.

DEPARTMENT OF CORRECTIONS

Grievance Appeal

(To be completed by staff member initially receiving appeal)

The inmate may appeal the Warden's, Deputy Warden's or Administrator's decision to the Director by requesting the appeal on this form.

Received by:
 Title:
 Badge #:
 Date:

PLEASE PRINT

Inmate's Name (Last, First, M.I.) <u>Atwood, Frank J</u>	ADC No. <u>062887</u>	Date <u>02-06-2022</u>
Institution <u>ASPC-E/Browning</u>	Case Number <u>22-035908</u>	

TO: Grievance Coordinator for Director Shinn

I am appealing the decision of COIV R. Brier for the following reasons:

On 2/4/22 COIV Brier alleged the issue of a spiritual advisor in the death chamber during execution was a matter of A&S codes and judicial proceedings so my grievance was unprocessed. I had grieved Dept. Order 710 disallowance of my spiritual father to conduct last rites (speak directly to me & lay hands on me) during execution. Please process this grievance appeal and authorize Father Paisios' presence in the death chamber with me when I am being executed.

Inmate's Signature <u>[Signature]</u>	Date <u>2/6/22</u>	Grievance Coordinator's Signature <u> </u>	Date <u> </u>
Response To Inmate By: <u> </u>		Location <u> </u>	

Staff Signature <u> </u>	Date <u> </u>
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DISTRIBUTION:
 INITIAL: White & Canary - Grievance Coordinator
 Pink - Inmate
 FINAL: White - Inmate
 Canary - Grievance File

802-3
7/13/09